TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 35.

JOHN F. HAFFNER, APPELLANT,

vs.

MICHAEL DOBRINSKI AND HENRY SHULTZ.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

FILED DECEMBER 7, 1907.

(20,925.)

(20,925.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 218.

JOHN F. HAFFNER, APPELLANT,

vs.

MICHAEL DOBRINSKI AND HENRY SHULTZ.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 18, 1908.

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1 UNITED STATES OF AMERICA,
Territory of Oklahoma, ss:

In the Supreme Court of the United States.

No. —.

JOHN F. HAFFNER, Plaintiff in Error,
vs.
MICHAEL DOBRINSKI and HENRY SHULTZ, Defendants in Error.

Citation.

The President of the United States to Michael Dobrinski and Henry Shultz, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at the City of Washington, D. C., within thirty days from the date hereof, pursuant to an order allowing an appeal entered in the Clerk's office of the Supreme Court of the Territory of Oklahoma from said Court to the Supreme Court of the United States of America, in that certain action numbered 1741, in which John F. Haffner is complainant and appellant, and you are respondent and appellee, to show cause, if any there be, why the decree rendered against the said complainant and appellant as in the order for an appeal mentioned, should not be reversed, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable B. F. Burwell, Associate Justice of the Supreme Court of the Territory of Oklahoma, this 28 day of October, A. D. 1907.

B. F. BURWELL,
Associate Justice of the Supreme Court of the Territory of Oklahoma.

Form No. 282.

Return on Service of Writ.

UNITED STATES OF AMERICA,
Lincoln Division, District of Nebraska, ss:

I hereby certify and return that I served the annexed Citation on the therein-named Michael Dobrinska and Henry Shultz by handing to and leaving a true and correct copy thereof with G. W. Berge, of the Firm of Berge, Morning & Ledwith, personally at Lincoln, Lancaster County, in said District on the 16th day of November, A. D. 1907.

WM. P. WARNER,
U. S. Marshal,
By CLAUDE P. HEMEL, *Deputy.*

2 [Endorsed:] #2924. No. 1741. In the Supreme Court of Oklahoma Territory. John F. Haffner, Plaintiff in Error, *vs.* Michael Dobrinski and Henry Shultz, Defendants in Error. Citation. Filed Nov. 20, 1907. W. H. L. Campbell, Clerk Supreme Court. —— ——, Attorney for Plaintiff in Error. Rec'd at Marshal's office 11/17, 1907. Handed Deputy 11/16, 1907.

Marshal's Costs:

Service	$2.00
Mileage	
Expense	
Total	$2.00

3 In the Supreme Court of Oklahoma Territory, Before the Honorable B. F. Burwell, Associate Justice of Said Court. In Chambers.

No. 1741.

JOHN F. HAFFNER, Plaintiff in Error,

vs.

MICHAEL DOBRINSKI and HENRY SHULTZ, Defendants in Error.

Petition in Error.

Comes John F. Haffner, the plaintiff in error, and complains of the defendants in error, Michael Dobrinski and Henry Shultz, and states that at the May term, 1904, of the District Court of Garfield County, Oklahoma Territory, Michael Dobrinski and Henry Shultz received and order or judgment by the consideration of said Court against John F. Haffner, upon the petition, answers, demurrers, motions and pleadings in said cause, aksing judgment for specific performance of a contract in which John F. Haffner was plaintiff, and Michael Dobrinski and Henry Shultz were defendants, and asking that Michael Dobrinski be required to make, execute and deliver to the plaintiff a good and sufficient deed to the East one-half (½) of the southwest quarter (¼) and lots three (3) and four (4) in section thirty-one (31) in township seventeen (17) north of range nine (9) West Indian Meridian, in Kingfisher County, Oklahoma Territory.

A certified transcript of all the orders, journal entries and original papers in the case made, duly certified, is hereto attached, marked Exhibit "A" and made a part of this petition in error, and the said John F. Haffner states that there is manifest error in said record and proceedings, in this:

4 1st. The findings and judgment of the Court are contrary to the law.

2nd. The judgment and findings of the Court are contrary to the evidence.

3rd. The Court erred in not reversing this cause for the manifest

error in refusing the plaintiff in error from introducing his evidence under the issues joined in this cause.

4th. The Court erred in not reversing this cause for the manifest error by the Court in sustaining the defendant's objection to the evidence offered on behalf of the plaintiff to sustain the issues on his behalf joined.

5th. The Court erred in not reversing this cause and giving judgment herein for the plaintiff upon the pleadings and issues joined.

6th. The Court erred in not reversing this cause because there was manifest error in dismissing the plaintiff's petition herein.

7th. The Court erred in not reversing the judgment of the court below because the plaintiff was required to give an injunction bond.

8th. The Court erred in not reversing this cause because the court below failed and refused to make the injunction herein perpetual.

9th. The Court erred in affirming the judgment of the court below in this cause.

5 Wherefore, the plaintiff in error prays said judgment so rendered may be reversed, set aside and held for naught, and that a judgment be ordered to be rendered in favor of the plaintiff in error, John F. Haffner, and against the defendants in error upon the facts herein, and that the plaintiff offer to submit his evidence, and that the plaintiff in error be restored to all the rights he has lost by the rendition of said judgment, and such other relief as justice and equity may demand.

W. A. McCARTNEY,
Attorney for Plaintiff in Error.

Endorsed: No. 1741—In the Supreme Court of Oklahoma Territory—John F. Haffner, Plaintiff in error, *vs.* Michael Dobrinski and Henry Shultz, Defendants in error—Petition in error—Filed Oct. 29, 1907. Benj. F. Hegler, Clerk Supreme Court.

6 In the Supreme Court of the Territory of Oklahoma, Before the Honorable B. F. Burwell, Associate Justice of Said Court. In Chambers.

No. 1741.

JOHN F. HAFFNER, Plaintiff in Error,
vs.
MICHAEL DOBRINSKI and HENRY SHULTZ, Defendants in Error.

Petition for an Order Allowing Appeal and for Supersedeas by Plaintiff in Error.

John F. Haffner, plaintiff in error in the above entitled cause, feeling himself aggrieved by the judgment entered in this Court on the 6 day of Sept., A. D. 1906, comes now by his attorneys, W. A. McCartney and Patrick S. Nagle, and petitions this Court for an order allowing said plaintiff in error to prosecute an appeal to the Honorable Supreme Court of the United States under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which

the plaintiff in error shall give and furnish upon said appeal, and that upon the giving of such security all further proceedings in this court shall be suspended and stayed until the determination of said appeal by the United States Supreme Court.

Wherefore, petitioner prays, that an appeal be allowed in said cause and that the amount of the supersedeas bond be fixed by this Court, and that the proceedings under the judgment of this or the mandate of the Supreme Court of the Territory of Oklahoma be stayed upon the filing of said bond and for all other proper relief.

W. A. McCARTNEY &
P. S. NAGLE,
Attorney- for Plaintiff in Error.

Endorsed: No. 1741—In the Supreme Court of Oklahoma Territory—John F. Haffner, Plaintiff in error, *vs.* Michael Dobrinski and Henry Shultz, Defendants in error.—Filed Oct. 29, 1907—Benj. F. Hegler, Clerk Supreme Court. Petition for order allowing appeal.

7 In the Supreme Court of Oklahoma Territory, Before the Honorable B. F. Burwell, Associate Justice of Said Court. In Chambers.

JOHN F. HAFFNER, Plaintiff in Error,
vs.
MICHAEL DOBRINSKI and HENRY SHULTZ, Defendants in Error.

Now, to wit, on this 28th day of October, A. D. 1907, upon motion of W. A. McCartney and Patrick S. Nagle, counsel for John F. Haffner, plaintiff in error, and on filing the petition of the said John F. Haffner for an order allowing an appeal in this cause, together with an assignment of error.

It is by me ordered that an appeal be and is hereby allowed to the Supreme Court of the United States of America from the judgment of this court, rendered in the above entitled cause on, to wit, the 6 day of Sept. A. D. 1906; said judgment being a final judgment in said cause, and it is further ordered that the amount of the supersedeas bond upon said appeal be, and the same is hereby fixed at the sum of twenty-five hundred dollars; and that upon the giving of said bond with good and sufficient securities, if said appeal is filed in the Supreme Court of the United States within thirty days, all proceedings under the mandate of the Supreme Court of Oklahoma Territory be, and the same are hereby stayed pending final disposition of this appeal to the Supreme Court of the United States.

Dated at Oklahoma City, O. T., in the Territory of Oklahoma, this 28 day of October, A. D. 1907.

[SEAL.]

B. F. BURWELL,
Associate Justice of the Supreme Court of Oklahoma Territory.

Attest:
BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

Endorsed: No. 1741—In the Supreme Court of Oklahoma Territory—John F. Haffner, Plaintiff in error, *vs.* Michael Dobrinski and Henry Shultz, Defendants in error—Order Allowing Appeal etc.—Filed Oct. 29, 1907. Benj. F. Hegler, Clerk Supreme Court.

8 In the Supreme Court of the Territory of Oklahoma.

JOHN F. HAFFNER, Plaintiff in Error,
vs.
MICHAEL DOBRINSKI and HENRY SHULTZ, Defendants in Error.

Petition in Error.

The said John F. Haffner, plaintiff in error, complains of said defendants in error for that Michael Dobeinski and Henry Shultz at the March, 1904, Term of the District Court of Kingfisher County and Territory of Oklahoma, recovered a judgment by the consideration of said Court against the said John F. Haffner in a certain action then pending in said Court wherein John F. Haffner was plaintiff and said Michael Dobrinski and Henry Shultz were defendants. A case made of said trial, duly certified and attested is hereunto attached, marked Exhibit "A" and made a part of this petition in error. And the said John F. Haffner avers that there is error in the said record and proceedings in this, to wit:

First. Said Court erred in overruling the motion of plaintiff in error for a new trial.

Second. Said Court erred in sustaining objection of the defendant below to the introduction of evidence under the pleadings.

Third. Said Court erred in refusing to permit the plaintiff to introduce evidence in support of his petition.

Fourth. Said Court erred in rendering judgment against the plaintiff and in favor of defendants below.

Fifth. Said Court erred in dismissing the petition and case below.

9 Sixth. Said Court erred in refusing to make the injunction perpetual and permanent.

Seventh. Said Court erred in requiring the plaintiff below to give bond in injunction.

Wherefore, the plaintiff in error prays that said judgment so rendered may be reversed, set aside and held for naught and that the plaintiff in error be restored to all his rights he has lost by the rendition of said judgment and for such other and further relief as to the Court may seem just.

W. A. McCARTNEY,
P. S. NAGLE,
Attorney- for Plaintiff in Error.

Filed May 16, 1905.
BENJ. F. HEGLER,
Clerk Supreme Court.

10 In the District Court of Kingfisher County and Territory o
Oklahoma.

JOHN F. HAFFNER, Plaintiff,
vs.
MICHAEL DOBRINSKI and HENRY SHULTZ, Defendants.

Case-made.

W. A. McCARTNEY &
PATRICK S. NAGLE,
Attorneys for Plaintiff.

11 & 12 In the District Court Within and for the County of King
Kingfisher and Territory of Oklahoma.

JOHN F. HAFFNER, Plaintiff,
vs.
MICHAEL DOBRINSKI and HENRY SHULTZ, Defendants.

Case-made.

Be it remembered that heretofore, to wit, on the thirteenth day o
May, 1902, said plaintiff, John F. Haffner, commenced his actio
against said defendants, by filing in the District Court of Kingfishe
County, his petition. Which said petition is in words and figure
as follows:

13 In the District Court of Kingfisher County, Oklahoma
Territory.

JOHN F. HAFFNER, Plaintiff,
vs.
MICHAEL DOBRINSKI and HENRY SHULTZ, Defendants.

Petition.

Now comes the said plaintiff, by his attorneys, Robert A. Lyle, W
A. McCartney and P. S. Nagle, and complains of the above name
defendants, and for his cause of actions against said defendants
states:

That said defendant, was on the 4th day of September, 1901, an
for a long — prior thereto had been, the owner in fee simple and i
peaceable possession of the following described real estate, to wit
The east half of the S. W. quarter and lots three and four of sectio
thirty-one, township seventeen, north of range nine, west of th
Indian Meridian, Kingfisher County, Territory of Oklahoma, an
was the owner of 1668 bushels of wheat and 30 bushels of oats, whic
said wheat and oats were stored in granaries on said described lan
on the 4th day of September, 1901, with the exception of 64 bushel

of wheat, which said 64 bushels of wheat was in a granary of one DeWalt, about one and one half miles from said described land.

That on the 4th day of September, 1901, the said Michael Dobrinski entered into a verbal contract with the said plaintiff, John F. Haffner, whereby he contracted and sold to said John F. Haffner the following described real estate, to wit:

The East half of the S. W. quarter and lots three and four in section thirty-one, township seventeen north of Range nine, West of the Indian Meridian, in Kingfisher County, O. T., for the consideration of $2900, and that at the same time and place and in the same contract said Dobrinski sold to said John F. Haffner 1668 bushels of wheat and 30 bushels of oats above described for
14 the sum of $920. That the said Dobrinski then and there and in said contract, stipulated, agreed and contracted that the said plaintiff John F. Haffner should pay for said land, wheat and oats, the sum of $3820, to be paid as follows: $1020 to be on or before the 1st day of January, 1902, $600 of which was to be applied by said Dobrinski in payment of a certain real estate mortgage then on record and unsatisfied against the said land, and the said Michael Dobrinski was then to execute to the said John F. Haffner a warranty deed to said land and the said John F. Haffner, upon the execution of said deed was to execute to Michael Dobrinski his note for $2800 and to secure the same by first mortgage on said land for said amount. Said note was to bear interest at the rate of 5 per cent. per annum, and to be made payable in ten years, and that said Haffner was to bind himself to apply all the proceeds arising from the crops raised upon said land annually, except so much thereof as said Haffner should have to pay out in cash for labor and farming said land, and in case said Haffner had to hire any help, he was to deduct the amount of help he necessarily had to hire for cash from the annual proceeds of the farm and pay all the balance of the proceeds on said note annually and that at the expiration of ten years he was to pay all the remaining amount due on said $2800 with the five per cent. interest on said sum, if any amount of said principal or interest remain unpaid.

That in pursuance of said contract, said Haffner paid to said defendant the sum of $50.20, and that thereafter on the 5th day of September, said Dobrinski turned over to said Haffner, under said contract, the real estate, wheat and oats above described, and placed said Haffner in peaceable possession thereof, and the said Haffner, with the full knowledge and consent of said Dobrinski, under said contract, entered into possession of above described real estate
15 and took possession of said wheat and oats, and began to improve said land and to farm said land, under said contract, and continued to make valuable and lasting improvements thereon by repairing the house, granaries and fences, cleaning out the well, trimming up and pruning the trees and expended labor and money in so improving the house, well, granaries, well, trees in the sum of $60, and that on the said 5th day of September, 1901, at the time said Dobrinski turned over and said Haffner took possession of said premises, under said contract, said Haffner began to prepare the

ground on said land for a crop and continued to prepare said ground and sowed to wheat 100 acres; that thereafter said Haffner prepared and put in 10 acres of oats; that said Haffner had, at the commencement of this action, growing upon the said land and in good condition 100 acres of wheat and 10 acres of oats, all of the value of $700. That prior to the bringing of this action on November 20, 1901, and while Michael Dobrinski was the owner in fee simple of said land, he executed to one John A. Webber a warranty deed to said land for the consideration of $1700, and the assuming of the then outstanding mortgage of $850.

That thereafter for a consideration unknown to this plaintiff he repurchased said land from said Webber and caused and procured said John A. Webber to execute a warranty deed to one Henry Shultz and that said deed to said Henry Shultz was wholly without consideration from said Shultz and said deed was executed by said Webber and delivered to said Dobrinski by said Webber, and by said Dobrinski placed on record, without the knowledge or consent of the said Shultz. That said Shultz held said land in trust for said Dobrinski.

16 The plaintiff further states that the sum of $2900 is a fair market price for said land at the time of said contract and was more than said land was or could have been sold for at any time, prior thereto. That the sum of $920 was a fair and full market price for the wheat and oats and was an equal market price per bushel of said grain at that time delivered at the elevator.

That prior to the first day of January, 1902, said plaintiff notified said defendant, by letter, that he was ready and willing to make the payment of $1020, which by the terms of said contract, became payable on the first day of January, 1902, and that the plaintiff was, and ever since has been ready and willing to pay the said $1020, except the $50.20 heretofore paid, but that the said defendant refused and still refuses to accept the same.

That the said plaintiff has at all times been ready and willing to execute to the said defendant his *won* first mortgage upon the said land for the sum of $2800, as per conditions of said contract, and has notified said defendant of his readiness and willingness to comply with his part of said contract and that said plaintiff has at all times been able, ready and willing to comply with each and every part of said contract upon his part, and has notified said defendant of his willingness but has been prevented from performing his part of said contract by defendant's refusing to accept $1020 and by the defendant's refusing to execute to this plaintiff a deed to said premises, so that the plaintiff could execute his mortgage thereon and that the plaintiff now offers to bring into court and deposit for the use of said plaintiff the sum of $1020, minus the $50.20 heretofore paid, to make and to execute to said defendant note for $2800, se-

17 cured by first mortgage on said real estate as per contract and to do and perform, all and singular, his part of the said contract.

That the said plaintiff is now and ever since the 5th of September, 1901, has been in the possession of said land, and has been and is

now farming the same, and that by reason of said contract and taking possession of said land, he has so arranged his business and plans for the future that a great and irreparable injury will be done to this plaintiff, unless said contract is specifically performed. That no just, fair or adequate assessment of damages could be made, and that the defendant, Michael Dobrinski, is not financially responsible for any adequate amount of damages and that the plaintiff has no plain and adequate remedy at law.

Wherefore, said plaintiff asks that said defendant, Michael Dobrinski, be directed and ordered to execute to this plaintiff a good and sufficient warranty deed to said land in accordance with said contract and upon the plaintiff complying with his part of the said contract, and for other and proper relief, and for the costs of this action.

R. A. LYLE,
P. S. NAGLE &
W. A. McCARTNEY,
Attorneys for Plaintiff.

Endorsements: #2596—In District Court of Kingfisher County, Oklahoma Territory—John F. Haffner, Pl'ff., *vs.* Michael Dobrinski and Henry Shultz, Def'ts.—Petition—Filed May 13, 1902, E. M. Hegler, Clerk, By George H. Laing, Deputy.

18 That thereafter, to wit, on October 30th, 1902, said defendant filed his demurrer to said petition, which demurrer was in words and figures as follows, to wit:

19 No. 1741.

JOHN F. HAFFNER
vs.
MICHAEL DOBRINSKI and HENRY SHULTZ.

Filed May 16th, 1905.
BENJ. F. HEGLER,
Clerk Supreme Court.

20 In the District Court of Oklahoma in and for Kingfisher County.

FRED DOBRENSKA
vs.
FRED HAFFNER, Dft.

Demurrer.

Comes now the above named defendant and demurs to the plaintiff's petition and for cause says that said petition does not state facts sufficient to constitute a cause of action.

ROBBERTS & BOWMAN,
Attys. for Defendant.

Endorsement: #2596. Fred Haffner, plff. *vs.* M. Dobrinski, Deft. Demurrer to petition. Filed October 30, 1902. E. M. Hegler, Clerk, By Geo. H. Laing, Deputy.

21 And thereafter, to-wit, on the December 20, 1902, the plaintiff filed his notice for Application for a Restraining Order and his application for said Order, which said Notice and Application are in words and figures as follows, to-wit:

22 In the District Court in and for Kingfisher County, Territory of Oklahoma.

JOHN F. HAFFNER, Plaintiff,
vs.
MICHAEL DOBRINSKI and HENRY SCHUTLZ, Defendants.

Notice of Application for Restraining Order.

To Michael Dobrinski, Defendant in the above entitled cause, and his attorneys of record:

You and each of you are hereby notified that the plaintiff in the above entitled cause, John F. Haffner, will at the hour of 2 o'clock P. M., Friday, December 19, 1902, move the Hon. C. F. Irwin, Judge of said Court, for an or-er enjoining and restraining the said defendant, Mic*ah*el Dobrinski from interfering with the plaintiff's possession with the following described real estate to-wit:

The S. W. ¼ of Sec. 31, Tp. 17, N. R. 9, W. I. M., Kingfisher county, Oklahoma Territory and from turther prosecuting any action or proceeding in any Court for the possession of said land or any action or proceeding for the recovery of any rents or profits or from bringing any action against the said John F. Haffner, growing out of any transaction connected with said real estate.

That the said motion will be presented to the Hon. C. F. Urwin, at his chambers in the city of El Reno, O. T. at the hour of 2 o'clock P. M. on said 19th day of December, 1902, or as soon thereafter as the same can be heard by said Judge.

That the application will be based upon the papers on file in this case and upon affidavits and other record evidence.

W. A. McCARTNEY,
R. A. LYLE AND
P. S. NAGLE,
Atty's for Pltff.

23 In the District Court of Kingfisher County, Oklahoma Territory.

FRED HAFFNER, Plaintiff,
vs.
MICAHEL DOBRINSKI and HENRY SCHULTZ, Defendants.

Application for Writ of Injunction.

Comes now the said plaintiff and prays said court to issue an order of injunction against the defendant herein, Michael Dobrinski, restraining him from prosecuting certain actions at law referred to in the affidavit hereto attached, marked Exhibit "A," and made a part hereof, and from bringing any further, other or different actions at law against this plaintiff, concerning the subject matter of this action, and restraining him from litigating or undertaking to litigate in any other court or in any other suit, ex-ept this proceeding, any issue that can be properly tried and determined by this Court in this cause, sitting as a Court of equity, or to seek any relief that can be awarded by this Court in the matter now pending in said Court, and in support of this application, the plaintiff tenders as evidence, the files in this cause, the affidavit hereto attached, and the files in the cases referred to in this affidavit, now pending in the Probate Court of said County.

McCARTNEY, LYLE AND NAGLE,
Attorneys for Plaintiff.

Affidavit.

TERRITORY OF OKLAHOMA,
County of Kingfisher, ss:

Comes now the said plaintiff, Fred Haffner, who makes oath and says:

That he is the identical person named in certain causes, as defendant, pending in the Probate Court of said County, numbered
24 in said Court 302 & 308, respectively, in which Michael Dobrinski is plaintiff, and Fred Haffner, this affiant, is defendant. That said causes are now pending in said Court and the said Probate Court is actually trying one of said causes and will try the other cause in the immediate future.

This affiant says that copies of the petition or complaint filed in the cause in said Probate Court are attached hereto, marked Exhibits "A" and "B" and made a part hereof.

This affiant now refers to the petition in this cause, pending in this court, known as case No. 2596, in which John F. Haffner is plaintiff and Michael Dobrinski is defendant, and upon oath says:

That every material allegation in said petition is true. This affiant says, however, that since the filing of said petition, he has learned that the defendant, Schultz, has quit-claimed the land now in controsver-y to this co-defendant, Michael Dobrinski.

That this action in the district Court is an action for the specific performance of a contract for the conveyance of real estate, described in the petition, filed in said cause.

That case # 302 in the Probate Court of Kingfisher County is an action brought by Michael Dorinski against John F. Haffner to recover a share of the grain which said Dobrinski claims as landlord and alleges that John F. Haffner was his tenant, and that the said grain, as alleged in said complaint, was raised on the identical land involved in this action in the District Court and for the conveyance of which the action in specific performance is now pending and that the crop and share of which the said Michael Dobrinski seeks to recover as landlord from John F. Haffner, as his tenant was raised upon said land, after John F. Haffner had taken possession under the contract, the specific performance of which is sought in this action, and that action # 338 is an action brought in the Probate Court under the forcible and detainer act, for the purpose of recovering the possession of the identical land mentioned in the petition in this action and that both of said actions have been commenced and that the defendant, Dobrinski, relies in his action for forcible entry and detainer upon the falsity of the allegations of the petition in this action.

And that the defendant, Dobrinski, has never answered the plaintiff's petition in this action and that he has been duly, legally and personally served with summons, and is wholly in default.

JOHN F. HAFFNER.

Subscribed to in my presence and sworn to before me this 20th day of December, 1902.

OLIVE M BROWN,
Notary Public.

My commission expires October 21, 1906.

In the Probate Court in and for the County of Kingfisher, Territory of Oklahoma.

MICHAEL DOBRINSKI, Plaintiff,
vs.
FRED HAFFNER, ANNIE HAFFNER, ED. MITCHELL & MRS. ED. MITCHELL, Defendants.

Amended Complaint.

TERRITORY OF OKLAHOMA,
County of Kingfisher, ss:

Michael Dobrinski being first duly sworn on his oath says that he is the plaintiff in the above entitled cause and that he is the owner and entitled to the immediate possession of the following described real estate, to-wit:

The E. ½ of the S. W. ¼ and lots 3 and 4 of Section 31, Tp. 17, N. of Range 9, W. I. M. in Kingfisher County, Territory of Oklahoma.

That on or about the 20th day of January, 1902, the said defenda-ts unlawfully and forcible and against the will of the above named plaintiff, entered into the possession of said premises and they do still forsible and unlawfully detain said premises from this plaintiff.

That on the 17th of October, 1902, the plaintiff s-rved notice in writing on said defendants, to quit and leave said premises, within ten days from the date of the service of the notice. A copy of said notice attached to this complaint and marked Exhibit "A" and made a part of this complaint.

That on the 29th day of October, 1902, the said plaintiff again served notices in writing on said defendants to quit and leave said premises within three days after the service of said notice. A copy of said notice is attached to this complaint and marked Ex-
27 hibit "B" and made a part thereof.

Wherefore, plaintiff prays for restitution of said premises, with costs of this action.

MICHAEL DOBRINSKI.

Subscribed and affirmed before me this 28th day of November, 1902.

SPENCER E. SANDER,
Probate Judge.

28 In the Probate Court of Kingfisher County, Oklahoma Territory.

MICHAEL DOBRINSKI, Plaintiff,
vs.
FRED HAFFNER, Defendant.

Petition.

The plaintiff complains of the defendant and for cause of action says:

That he is the owner of the S. W. ¼ of Sec. 31, Tp. 17, R. 9, W. I. M., Kingfisher County, Oklahoma Territory, and that the said defendant is the tenant of said plaintiff, and as such tenant has raised and harvested upon said land about 1500 hundred bushels of wheat, which is now in the possession or under control of said defendant. Plaintiff further alleges that as such landlord, he has a lien on said wheat for the amount due him, as such tenant for the rent of said land, which said rent is payable from said defendant to this plaintiff in a certain share or proportion of said wheat, to-wit: one half thereof, and this plaintiff has demanded said wheat from said defendant, but said defendant has failed, neglected and refused and still fails, neglects, and refuses to deliver the said wheat to this plaintiff.

That said interest or lien of this plaintiff in said wheat is worth and of the value of $400.00, and there is due from said defendant to this plaintiff, as rent for the use of said land and as the value of

plaintiff's share or interest in said wheat the sum of $400.00, no part of which has ever been paid.

Plaintiff further alleges that said defendant has threatened and intends to remove said crop, and is removing the same from said premises, and has threatened and is attempting to sell said
29 crop for the purpose of cheating and defrauding the plaintiff of his interest therein and to defeat the plaintiff in the collection of the amount due him, from said defendant, for the use of said premises.

Wherefore, plaintiff prays for judgment against said defendant in the sum of $400.00, and that in the meantime an attachment issue against said crop of wheat above referred to, and that the plaintiff's lien thereon may be foreclosed and said crop of wheat sold for the payment thereof, with costs of suit.

ROBERTS & BOWMAN,
Attorneys.

TERRITORY OF OKLAHOMA,
County of Kingfisher, ss:

Michael Dobrinski being duly sworn says: that he is plaintiff in the above entitled cause, has heard read the foregoing petition and knows the contents thereof and the matters and things therein stated are true.

M. DOBRINSKI.

Subscribed and sworn to before me this 14th day of July, 1902.
SPENCER SANDERS,
Probate Judge.

30 In the Probate Court of Kingfisher County, Oklahoma Territory.

MICHAEL DOBRINSKI, Plaintiff,
vs.
FRED HAFFNER, Defendant.

Affidavit.

TERRITORY OF OKLAHOMA,
County of Kingfisher, ss:

Michael Dobrinski being duly sworn on his oath says:

That he is the plaintiff in the above entitled cause and that he has commenced said action against said defendant, to recover from him the sum of $400.00 for rent due from said defendant for the use of certain land hereinafter named.

That there is due from said defendant to this plaintiff the sum of $400.00 for rent of farming lands described as follows: to-wit: The S. W. ¼ of Sec. 31, Tp. 17, R. 9, W. I. M. in Kingfisher county, O. T., and that the plaintiff claims a lien on about 1500 hundred bushels of wheat, which said wheat was raised upon the said de-

scribed tract of land, and this affiant is the owner of said tract of land.

And affiant further says that said defendant has threatened to, and intends to remove said crop from the above described premises, and is removing the same from said premises, and is threatening and attempting to sell said crop of wheat for the purpose of cheating and defrauding this plaintiff of his rent due for said premises, and to hinder and delay him in collecting the amount due from said defendant to plaintiff for the rent above specified.

M. DOBRINSKI.

Subscribed and sworn to before me this 14th day of July, 1902.
[SEAL.] SPENCER E. SANDERS,
Probate Judge.

31 Endorsements: #2596. In the District Court of Kingfisher County, Oklahoma Territory. Haffner, Plaintiff, *vs.* Do-rinski, *et al.*, Defendants. Application for Injunction. Filed Dec. 20, 1902. E. M. Hegler, Clerk of District Court, By George H. Laing, Deputy.

32 That thereafter, to-wit: on the 14th day of January, 1903, said application for a restraining order was heard and application granted. Which said Order is in words and figures as follows:

33 In the District Court within and for the County of Kingfisher, Territory of Oklahoma.

FREDERICK F. HAFFNER, Plaintiff,
vs.
MICHAEL DOBRINSKI and HENRY SCHULTZ, Defendants.

Restraining Order.

Now upon this 14th day of January, A. D. 1903, this cause came on before me, the undersigned Judge at my Chambers in the City of El Reno, upon motion and application for a r*eastra*in-g order in the above entitled action, the plaintiff being present by his attorneys, P. S. Nagle and W. A. McCartney and the defendant being present by his attorney, Geo. L. Bowman and it having been made to appear to the undersigned judge that due and legal notice of said application was had, and after hearing the evidence, argument of counsel and being fully advised in the premises, the Judge finds: That said motion should be sustained and said order should be granted.

It is therefore considered and ordered that the defendant, Michael Dobrinski, be and is hereby restrained from prosecuting any and all actions now pending in the Probate Court of Kingfisher County, in which Michael Dobrinski is plaintiff and Frederick Haffner is defendant, or taking any steps in said causes, or from bringing or prosecuting any actions in said Probate Court or in any other Court,

except in defense of this action, growing out of or connected with the causes of action alleged in plaintiff's petition, and commenced since the filing of the petition in this action, to-wit: the 14th day of May, 1902, filed herein, the same being a petition for the specific performance of a contract of sale for the S. ½ of the S. W. ¼ and lots 3 and 4 of Sections 31, T. 17. N. of R. 9, W. I. M., in Kingfisher county, Territory of Oklahoma, or from in any way interfering with the possession of said land or doing any acts to change
34 or tending to change the status of said parties to said land as it existed at the time of filing the said petition herein;

That this order shall be in force and effect from and after the plaintiff's filing a bond in the sum of Five Hundred Dollars to be approved by the Clerk of the District Court of Kingfisher County, conditioned that said plaintiff shall pay to said defendant any and all damages that he may sustain in case it shall finally be considered and adjudged that this order should not have been issued.

C. F. IRWIN, *Judge.*

35 And thereafter, to-wit, on the 9th day of March, 1903, the defendant, Michael Dobrinski, filed his motion to dissolve restraining order, heretofore granted. Which said motion is in words and figures as follows, to-wit:

36 In the District Court of Kingfisher County, Territory of Oklahoma.

JOHN F. HAFFNER, Plaintiff,
vs.
MICHAEL DOBRINSKI and HENRY SHULTZ, Defendants.

Motion.

Comes now the defendant, Michael Dobrinski, and moves the Court to dissolve the Restraining Order heretofore granted by this Court.

MICHAEL DOBRINSKI,
By ROBERTS & BOWMAN AND
G. W. BERGE, *Attorneys.*

Endorsements: #2596. Haffner *vs.* Dobrinski *et al.* Motion. Filed March 9th, 1903. E. M. Hegler, Clerk. By Geo. H. Laing, Deputy.

37 And thereupon the Court over-ruled said Motion, which ruling of the Court is in words and figures as follows, to-wit:

"And now comes on for hearing defendant's motion to Dissolve the Temporary Re*trsina*ing Order heretofore issued, and the Court being fully advised in the premises over-ruled said motion and exception allowed."

And thereupon the demurred to the petit*t*ion was taken up and passed upon by the Court, which said ruling of the court was in words and figures as follows, to-wit:

"And now comes the Defendants and files and presents their de-

murrer to the petition herein, and the Court after having heard counsel and being fully advised in the premises, sustains said motion and gives the plaintiff until March 14th, 1903, to amend."

38 That thereafter, to-wit, on the 18th day of March, 1903, the plaintiff, after first having obtained leave of Court, to file his amended petition out of time, filed said Amended Petition. Which said amended petition with the endorsements thereon are in words and figures as follows, to-wit:

39 In the District Court in and for Kingfisher County, Territory of Oklahoma.

JOHN F. HAFFNER, Plaintiff,
vs.
MICHAEL DOBRINSKI and HENRY SHULTS, Defendants.

Amended and Supplemental Petition.

Comes now said plaintiff by his attorneys, P. S. Nagle and W. A. McCartney, and complain of the above named defendants and for his cause of action against said defendants states:

That said defendant, Michael Dobrinski, was on the 4th day of September, 1901, and for a long time prior thereto had been the owner in fee simple and in peaceable possession of the following described real estate, to-wit: The East half and lots three and four of section thirty-one (31), Tp. seventeen (17), Range nine (9), West of the Indian Meridian, in Kingfisher County, Territory of Oklahoma and was the owner of one thousand, six hundred sixty-eight (1668) bushels of wheat and thirty bushels of oats, which said wheat and oats were stored in granaries on said described land on the said 4th day of September, 1901, with the exception of sixty-four bushels of wheat, which said sixty-four (64) bushels was in the granary of one De Walt, about a mile and a half from the land above described.

That on the 4th day of September, 1901, the said Michael Dobrinski entered into a verbal contract with said plaintiff, John F. Haffner, whereby he contracted and sold to said John F. Haffner, the above described real estate, to-wit, the East half and lots three (3) and four (4) Sec. 31, Tp. 17, Range 9, W. I. M. in Kingfisher County and Oklahoma Territory, for the consideration of twenty-nine hundred ($2900.00) Dollars, and at the same time and place in the same contract, said Drobrinski sold to said John F. Haffner, the said

40 one thousand six hundred sixty eight (1668) bushels of wheat and thirty bushels of oats above described for the sum of nine hundred twenty ($920.00) dollars.

That the said Drobinski then and there and in said contract, stipulated, agreed and contracted that the said plaintiff, John F. Haffner, should pay for said land, wheat and oats, the sum of three thousand eight hundred twenty (3820.00) dollars to be paid as follows: One thousand and twenty ($1020.00) dollars to be paid on or before the 1st day of January, 1902; six hundred ($600.00) dollars of which

was to be applied by said Drobinski in the payment of a certain real estate mortgage then on record and unsatisfied against said land, and the said Michael Drobinski was then to execute to the said John F. Haffner a warr-nty deed to the said land and John F. Haffner upon the execution of daid deed was to execute to Michael Drobinski his note for twenty-eight hundred ($2800.00) dollars and to execute the same by first mortgage on said land for said amount. Said note was to bear interest at the rate of five per cent. per annum and to be made payable in ten (10) years but said Haffner was to bind himself to apply all of the proceeds arising from the crops raised upon said land annually, except so much thereof, as said Haffner should have to pay out in cash for labor in farming said land. And in case said Haffner had to nire any help, he was to ded-ct the amount of the help, he necessarily had to hire for cash, from the annual proceeds of the farm and to pay all of the balance of said proceeds on said note annually, and that at the expiration of ten years, he was to pay all the remaining amount, due on said twenty-eight hundred ($2800.00) dollars with five per cent. interest on said sum, if any amount of principal or interest should then remain unpaid.

That in pursuance of said contract, said Haffner paid to said Drobinski the sum of fifty and 20/100 ($50.20) dollars. That thereafter and on the 5th day of September, 1901, the said Drobinski turned over to said Haffner, under said contract, the real estate, wheat and oats above described and placed said Haffner
41 in peaceable possession thereof and that said Haffner with the full knowledge and consent of said Drobrinski, under said contract, entered into the possession of the above described real estate and took possession of the said wheat and oats and began to improve said land and to farm said land, under said contract, and continued to make valuable and lasting improvements thereon by repairing the house, granary and fences, and by cleaning out the well and trimming up and pr-ning the orchard and expended labor any money in so improving the house, well, granary, fence and trees in the sum of ($60.00) dollars, and that on the said 5th day of September, 1901, and at the time said Drobinski turned over and said Haffner took possession of said premises, under said contract, said Haffner began to prepare the ground on said land for a crop and continued to prepare said ground and sowed to wheat one hundred (100) acres. That thereafter said Haffner prepared and put in ten (10) acres of oats. That said Haffner had, at the time of the commencement of this action, growing upon said land and in good condition one hundred (100) acres of wheat, ten (10) acres of oats, all of the value of Seven Hundred ($700.00) dollars.

That prior to the bringing of this action on November 20th, 1901, and while Michael Drobinski was the owner in fee simple of the said land, he executed to one John A. Webber a warranty deed to said land for the consideration of seventeen hundred ($1700.00) dollars and the assuming of the then outstanding mortgage of eight hundred fifty ($850.00) dollars, a warranty deed to said land.

That thereafter for a consideration unknown to this plaintiff he repurchased said land from said John A. Webber and caused and procured John A. Webber to execute a warranty deed to one Henry

Shultz but that said deed to said Shults was wholly without any consideration from said Shultz and said deed was executed by said Webber, delivered to said Drobinski and by said Drobinski placed on record, without the knowledge or consent of said Shultz.

42 That the said Shultz held said land in trust for said Drobinski.

That thereafter the said Shultz for and in consideration of one ($1.00) dollar, executed to the said Drobinski his quit-claim deed for the above described real estate.

The plaintiff further states that the sum of twenty-nine hundred ($2900.00) dollars is a fair and full market price for said land at the time of said contract and was more than said land was or could have been sold for at any time prior thereto. That the sum of nine hundred twenty ($920.00) dollars was a full and fair market price for the wheat and oats and was equal to the market price per bushel of said grain at that time delivered at the elevator.

That prior to the 1st day of January, 1902, said plaintiff notified said defendant by letter that he was ready and willing to make the payment of one thousand and twenty ($1020.00) dollars, which by the terms of said contract became payable on the first day of January, 1902, and that the defendant was, during the month of December and on the first day of January and ever since has been ready and willing to pay the said one thousand and twenty ($1020.00) dollars, except the $50.20 heretofore paid but that defendant has refused and still refuses to accept the same.

That said plaintiff has at all times been ready to execute to the said defendant his note and first mortgage upon the said land for the sum of two thousand eight hundred ($2800.00) dollars as per conditions of said contract and has notified said defendant of his readiness and willingness to comply with his part of said contract and that said plaintiff has at all times been able to, ready and willing to comply with each and every condition of said contract upon his part, and has notified said defendant of his ability and willingness but has been prevented from performing his part of the said contract by the defendants refusing to accept the one thousand and twenty ($1020.00) dollars and by the defendants refusing to execute to this plaintiff a deed to the said premises, so that said

43 plaintiff could execute his mortgage thereon and that the plaintiff now offers to bring into court and deposit for the use of said plaintiff the sum of one thousand and twenty ($1020.00) dollars, minus the fifty dollars heretofore paid, to make and execute to said defendant his note for two thousand eight hundred ($2800.00) dollars, secured by first mortgage on said real estate, as per said contract, and to do and perform, all and singular his part of the contract.

Plaintiff further alleges that since the filing of this suit, the plaintiff has harvested and threshed from the one hundred (100) acres of wheat, owned by him on said land, under said contract and growing on said land, at the time said suit was brought, six-hundred and seventy two (672) bushels of wheat and has harvested six hundred and seventy two bushels of wheat of the *and* value of sixty-eight ($.56) cents per bushel.

That said plaintiff was able to sow, harvest and thresh said wheat without any cash outlay on his part, but did the same with his own help and use of his machinery and exchange of work with other neighbors, and that said plaintiff has harvested and threshed sin-e the commen-ement of this suit from the ten (10) acres of oats sown on said land by said plaintiff under said contract of purchase, two hundred and thirty (230) number of bushels of oats of the value of thirty ($.30) cents.

That said plaintiff was enabled without cash outlay for hired help to harvest and thresh the same and is now willing and offers to bring into court and pay upon said note as per contract, the sum of $458.76, as the proceeds of said farm over and above cash outlay of hired help.

That said plaintiff is now and ever since the 5th of September, 1901, has been in the possession of said land and has been and is now farming the same, and that by reason of his said contract
44 and the taking of said land, he has so arranged his business and plans for the future that a great and irreparable injury will be done to this plaintiff unless said contract is specifically performed.

That no just, fair or adequate assessment of damages could be made, and that the defendant, Michael Dobrinski, is not financially responsible for any adequate amount of damages, and that the plaintiff has no plain and adequate remedy at law.

Wherefore, said plaintiff asks that the said defendant, Michael Dobrinski, be directed and ordered to execute and deliver to this plaintiff a good and sufficient warranty deed to the land in accordance with the said contract and upon the plaintiff's complying with his part of said contract, and for other proper and equitable relief, and for the costs of the action.

P. S. NAGLE &
W. A. McCARTNEY,
Attorneys for Plaintiff.

45 TERRITORY OF OKLAHOMA,
County of Kingfisher, ss:

John F. Haffner of lawful age being first duly sworn deposes and says my name is John F. Haffner. I am plaintiff in the above entitled action. I have heard the foregoing petition read and know the contents thereof, and that the allegations and matters and facts therein set forth are true.

JOHN F. HAFFNER.

Subscribed and sworn to before me this 16th day of March, 1903.
[SEAL.] OLIVE M. BROWN,
Notary Public.

My commission expires October 21, 1906.

Endorsements: No. 2596. In the District Court of Kingfisher County, Oklahoma Territory. John F. Haffner, Plaintiff, *vs.* Michael Dobrinski and Henry Shultz, Defendants. Amended and Supplemental Petition. Filed March 18, 1903, by leave of court. E. M. Hegler, Clerk District Court.

46 And thereafter, to-wit, on the 23rd day of March, 1903, the defendant, Michael Dobrinski, filed his separate answer. Which said separate answer with endorsements thereon, is in words and figures as follows, to-wit:

47 In the District Court of Kingfisher County, Oklahoma Territory.

JOHN F. HAFFNER, Plaintiff,
vs.
MICHAEL DOBRINSKI and HENRY SHULTZ, Defendants.

Separate Answer of Michael Dobrinski.

First Defense.

Comes now the defendant, Micahel Dobrinski, and for answer to the amended petition of plaintiff filed herein, admits that on the 4th day of September, 1901, he was equitable owenr of the southwest quarter (S. W. ¼) of Section thirty-one (31), Township seventeen (17), North of Range Nine (9) West, in Kingfisher County, Oklahoma Territory; admits that he was the legal owner of 1650 bushels of wheat and thirty bushels of oats and that said wheat and oats were stored in a granary upon this defendant's farm above described; admits that one September 4th, 1901, the defendant, Henry Shultz, was holding the legal title to said land in trust for this defendant; and further answering this defendant denies each and every allegation in plaintiff's amended petition contained and states that they are absolutely and unqualifiedly false in each and every particular.

Further answering this defendant alleges the fact to be that on or about September 1, 1901, this defendant leased the above described premises to one Henry Fahrensbruch, who was a relative of the plaintiff, for a period of one year, commencing March 1, 1902, and to continue to March 1, 1903, but said Fahrensbruch was to have possession of said premises during the fall of 1901 for the purpose of plowing and sowing a portion of said premises into winter wheat.

After this defendant had leased said premises to said Fahrensbruch, and after having placed said Fahrensbruch in possession of said premises, this defendant left the Territory of Oklahoma, and went to the State of Nebraska, to visit with his children; that during the

48 fall of 1901 said Fahrensbruch did plow and sow a large portion of said premises into winter wheat; that during the fall of 1901, this defendant had stored in his granary on his farm above described, about 1800 bushels also some oats, and before going to Nebraska, this defendan- securely nailed shut said granary and made arrangements with a neighbor to haul said wheat to market when the market price of wheat should suit this defendant; that on the — day of February, 1902, this defendant was advised that the plaintiff had unlawfully and fraudulently entered the premises of this defendant, above described, and had broken open the granary upon defendant's premises and had stolen said wheat

and oats; that upon being advised of these facts, this defendant immediately came to Oklahoma and found that said granary had been broken open and said wheat had all been hauled away, except about one hundred bushels; that thereupon this defendant pursued said wheat and the defendant avers that the plaintiff had fraudulently and wrongfully and in a wanton manner sold said wheat to one Henry Kline, who is a brother-in-law of the plaintiff, and that said Henry Kline and the plaintiff together had delivered said wheat at the elevator owned by J. C. Robb in Hitchcock, Blaine County, Oklahoma Territory; that thereupon this defendant brought a replevin suit in Blaine County, Oklahoma Territory in which this defendant was plaintiff and the plaintiff, John F. Haffner and Henry Kline and J. C. Robb were defendants, for the purpose of recovering said wheat, so wrongfully and fraudulently taken by the plaintiff.

That the plaintiff at the time of the wrongful taking of this wheat, also wrongfully and fraudulently and by force entered the above described real estate, and by threat and intimidation drove off from said premises said Henry Fahrensbruch, the tenant of this defendant, and wrongfully and fraudulently and by force took possession of said premises and ever since said time has wrongfully and fraudulently and forcibly and against the will of this defendant held the possession of said premises by placing other parties into actual possession thereof, and by force, through said third parties kept
49 this defendant off from and out of the possession of said premises.

This defendant specifically denies that the plaintiff has made any improvements upon said premises, but alleges the fact to be that all of the improvements on said premises have been permitted to deteriorate and run down in value; that the plaintiff has destroyed and permitted others to destroy the fruit trees and shade trees growing upon said premises; that he has destroyed and permitted others to destroy, the fences and house and stable upon said premises, and that not one cent of money has been expended by the plaintiff or any other person during the entire time this defendant has been unlawfully kept out of possession of said premises, but on the contrary, during the entire time this defendant has been unlawfully kept out of possession of said premises, this p-aint-ff and persons plaintiff, has put into actual possession of said premises, have committed waste thereon.

This defendant further specifically denies that he ever agreed to sell said premises to the plaintiff, and denies that plaintiff has ever paid this defendant one cent of money, and denies that he has ever given plaintiff the right to enter into the possession of said premises, or that he has acquiesced in anything that plaintiff has done, but that from the beginning he has made every effort possible to regain possession of said premises, which this plaintiff has wrongfully and unlawfully deprived this defendant of, and denies that any contract or agreement of any kind, whatsoever, was ever entered into, whereby this defendant agreed to sell the above described premises, or the wheat and oats stored thereon, to this plaintiff, and this defendant

alleges the fact to be, that the plaintiff is a tresspasser, and that he is in possession of this defendant's premises without any color of right whatever.

50 This defendant further states that he has endeavored in a peaceable manner to regain possession of his farm, the above described premises, but that the plaintiff has kept him out by force and by threats and by intimidation, and has patrolled the highways with a shot gun to keep this defendant away and off from said premises and out of the possession thereof; that this plaintiff, after unlawfully and by force, taking possession of said premises, and driving off from said premises the tenant of this defendant, thereafter and has ever since held possession of said premises by placing other parties into actual possession, by force and against the will of this defendant, and ever since said — day of February, 1902, up to the present time has had possession, and that the plaintiff herein has wrongfully and fraudulently and unlawfully harvested the crop on said premises for the year 1902, being the crop put in by this defendant's tenant, Henry Fahrensbruch, and that the plaintiff has appropriated all of the proceeds of said crop to his own use, and this defendant has received not a cent from the said premises for the year 1902; that the plaintiff, now for more than a year, has had the unlawful possession of this defendant's farm, above described, and that he has appropriated all of the crop raised during the year 1902, upon said premises; that he has never paid the defendant one cent of money; that he has no contract in writing or oral, or any agreement of any kind whatsoever, whereby he is entitled to the possession of said premises, and this defendant avers that all of the doings of the plaintiff has been without the consent of the defendant and against the will of this defendant, and that plaintiff is a mere tresspasser, and in possession of said premises without any color of right whatever.

Second Defense.

This defendant further answering states that the above described premises is the homestead of this defendant, which he has

51 never abandoned *abandoned* as such, and says that the same is his homestead at the present time. And this defendant avers that as to the alleged agreement set up in plaintiff's petition that this defendant, nor any person authorized by him ever made or signed any contract or agreement, or note or memoranda thereof in writing; that he never made any agreement, either verbal or written, for the sale of said premises, or any part thereof to the plaintiff herein; and defendant states that said alleged agreement set out in plaintiff's petition under Section 6 of Article 2, Chapter 18, 1893 Statutes of the Territory of Oklahoma, and also Section 4 of Chapter 10, of the session laws of 1901, Territory of Oklahoma, is invalid and void.

Third Defense.

Further answering this defendant states that on the — day of February, 1902, this defendant brought a replevin*g* suit in the District Court of Blaine County, and Territory of Oklahoma, in which

suit this defendant was plaintiff and John F. Haffner, the plaintiff herein, and J. C. Robb and Henry Kline, were defendants, that in said suit this defendant averred that the plaintiff herein John F. Haffner, had broken open his granary upon this defendant's farm, above described, and had stolen from this defendant 1800 bushels of wheat, and that this defendant was the owner of and entitled to immediate possession of said wheat; that the plaintiff herein, defendant in said suit, filed his answer, denying each and every allegation in plaintiff's petition contained. Also Henry Kline and J. C. Robb, who were defendants in said suit, filed each separate general denials, and thereafter on the — day of November, 1902, trial of said cause was had at Watonga, in Blaine County, Territory of Oklahoma, and in the trial of said cause the plaintiff herein, defendant in said suit, introduced evidence tending to establish the identical matters
52 and claims set up in the plaintiff's petition in this action, viz: That on the 4th day of September, 1901, this defendant was the equitable owner of the premises in controversy, and that on said day, plaintiff claimed he bought of this defendant the real estate in controversy herein, and including as a part of said contract to purchase the real estate, above described, also the wheat involved in said replevin suit, claiming that the contract made on September 4th, 1901, was but one contract, and under said one contract he had a right to both the wheat and the farm in controversy in this suit, and that the wheat which he was claiming and the land in controversy herein, pertained to the same transaction, and was in fact but one transaction, and in said replevin*g* suit, the plaintiff herein had witnesses sworn and introduced evidence, seeking to show a contract for the purchase of the real estate, because the purchase of the real estate, as he claimed, and the purchase of the wheat were involved in one and the same transaction, and that in fact only one contract was made, and that said contract extended to the whole subject matter of the controversy between the parties, and this defendant states that in said replevin suit, the only question in issue and litigated was the question as to whether or not there was such a contract or agreement, as claimed by the plaintiff in the petition filed in this suit. This defendant, plaintiff in said suit, denied absolutely, all of the matters and claims made by the plaintiff herein and insisted that said wheat had been taken by the plaintiff herein, fraudulently and unlawfully, and without any color of right whatever; that no contract, in fact, of any kind was made.

That a jury having been duly empanelled before the taking of the testimony, and after a full hearing of all the controversy between the parties herein, and argument of counsel, and after the court had duly instructed the jury upon the law in the case,
53 the jury returned the following verdict:

"We, the jury, duly empanelled and sworn in the above entitled cause, find that the right of property and the right of possession of said wheat, when this action was commenced, was in the plaintiff and find that 1687 bushels were wrongfully and fraudulently taken and *c*etained from the plaintiff by the defendants,

J. C. Robb, Henry Kline and Frederick Haffner, and that the value of said wheat at the time of the wrongful taking was $1197.77.

We further find that the plaintiff was damaged $400.00 for the wrongful taking and detention of said wheat.

J. R. KRATZ, *Foreman.*"

Also this defendant avers that before the final submission of said cause to the jury, plaintiff herein, defendant in said suit, submitted to the jury certain interrogatories asking for special findings by the jury, and defendant states that the following is a true copy of all the interrogatories submitted by the plaintiff herein to the jury in said cause with the answers made by the jury to each interrogatory so submitted.

One. Who was in the actual possession of the wheat sought to be recovered by this action at the time of the commencement of this action? Ans. Defendants.

Two. Where was the wheat located at the time of the commencement of this action. Ans. 1430 bushels, located in J. C. Robb's elevator at Hitchcock. Balance not located.

Three. Had the defendant, Kline, any control over the wheat stored in the elevator of J. C. Robb at Hitchcock at the time of the commencement of this action? Ans. No.

Four. Had the defendant, J. C. Robb, paid the defendant Kline, in full for all wheat bought from him at the time of the commencement of this action? Ans. Yes.

Five. Had the defendant, Kline, paid the defendant, Haffner, in full for the wheat at the time of the commencement of this action? Ans. Yes.

Six. What was the date of the delivery of the last wheat delivered by Kline to Robb? Ans. Feb. 1, 1902.

Seven. Did the plaintiff, Dobrinski, put the defendant, Haffner, in possession of the wheat in controversy in this cause? Ans. No.

54 Eight. If you should answer the last preceding question in the affirmative then you may state at about what time plaintiff so put said defendant, Haffner, in possession? — —.

Nine. Did the plaintiff, Dobrinski, hold the defendant, Haffner, out as the owner of said wheat, and represent to others, or in the presence of others that said Haffner was the owner of said wheat? Ans. No.

Tenth. Did the plaintiff permit the defendant, Haffner, to take possession of said wheat, and so act with reference to said wheat as to lead others to believe that said Haffner was the owner of said wheat or ("2" page) had the right to sell the same? Ans. No.

Eleventh. Did the defendant, Haffner, sow the quarter section upon which the wheat in controversy was stored to wheat in the fall of 1901? Ans. No; sowed about twenty-five or thirty acres.

Thirteenth. Did not the plaintiff, Dobrinski, see the defendant, Haffner, farming the land upon which this wheat was stored and grazing his cattle on the same on or about the 19th day of Sept.

1901, and just after the return of the said Dobrinski from the new country? Ans. No.

Foreman, J. R. KRATZ.

This defendant therefore states that this action is based upon the same identical facts, as was said replevin action, which was tried in Blaine County, Territory of Oklahoma, as above alleged, and defendant states in said replevin suit the matters litigated extended to the whole subject matter of the controversy between the parties, and that all of the controversy between the parties pertains to the same transaction or subject matter that the plaintiff herein claims in this suit, that he was entitled to the possession of the wheat under the same contract under which he is entitled to the real estate described herein. And this defendant states that an adjudication of the matters claimed by this plaintiff in said replevin suit settled the entire controversy between this defendant and this plaintiff for the reason that said entire controver*ys* arises out of but one alleged claim made by this plaintiff, and this defendant states that the judgment in said replevin suit is a finality to all the matters in controsver-y between the plaintiff and this defendant.

55 This defendant states that after the verdict of the jury in said replevin suit, and said special findings by the jury, a motion for a new trial was filed by the plaintiff herein, which was over-ruled by the court and judgment rendered thereunder in the *la*ternate form as provided by law, which judgment this defendant states is now in full force and unappealed from, and defendant states that said judgment in said replevin suit is a complete bar to the prosecution of this action for the reason that all matters and controversies between the parties are fully litigated and adjudicated, and plaintiff is estopped from the further prosecution of this action.

This defendant states that the District Court of Blaine County, Territory of Oklahoma, had jurisdiction of the subject matter and of the identical persons involved in this suit at the time said replevin suit was begun and tried in Blaine County, Territory of Oklahoma.

Fourth Defense.

Further answering this defendant says that on the 17th day of October, 1902, and again on the — day of October, 1902, this defendant served notice in writing upon the plaintiff herein, as provided by the laws of the Territory of Oklahoma, notifying the plaintiff herein to leave the premises above described, belonging to this defendant; that thereupon, on the — day of — this defendant commenced an action in the County Court of Kingfisher County, Territory of Oklahoma, in which this defendant was plaintiff and John Haffner and Mrs. John Haffner and —— were defendants, alleging that this defendant was the owner of the above described premises and entitled to the possession thereof and that on or about the — day of February, 1902, the plaintiff in this action, John F. Haffner, who

56 was one of the defendants in said suit, unlawfully and forcibly and against the will of this defendant entered upon said premises, and that he did then and still forcibly and unlaw-

fully detain- possession of said premises, from this defendant, and this defendant alleged further that prior to the beginning of said forcible and detention suit that he had served the proper notice, as required by the statute of the Territory of Oklahoma, upon this plaintiff and the other defendants named in said suit, to leave said premises, and this defendant in said suit in the county court of Kingfisher County, Territory of Oklahoma, asked restitution of said premises and for costs of suit.

That thereafter, and upon the — day of November, 1902, the plaintiff in this action, defendant in said suit, filed his answer and in said answer the plaintiff herein set up in the petition filed by said John F. Haffner in this action, viz: That on the 4th day of September, 1902, he claimed that he had purchased said premises, and also the wheat, hereinbefore referred to in the replevin suit, from this defendant, and that this defendant had placed the plaintiff in possession of said premises, and that he was claiming to hold possession of said premises by reason of said alleged contract of purchase set up in the petition by said John F. Haffner in this suit. In said forcible entry and detention suit, the plaintiff herein had witnesses sworn and plaintiff sought to establish the alleged contract set out in his petition in this suit, and sought to prove that there was but one alleged contract, plaintiff in this action claiming to have with this defendant, under which and by which he bought both the wheat stored upon said farm and also the real estate described herein, claiming that both of said matters pertain*ing* to the same transactions, and that he, the plaintiff, in this action, only had in fact one transaction with the defendant, by which he claimed both the wheat and the farm, and that said alleged contract extended to the whole subject matter of the controversy between the parties. A jury was duly empan*n*eled and trial had, and after all of the testimony
57 had been introduced and after argument of counsel, the jury, in said action, returned a verdict, fully signed by the foreman, finding that the defendant in said action, John Haffner, was guilty in the manner and form as charged in the petition filed by this defendant, plaintiff in said suit, and found that this defendant was entitled to the possession of the above described premise*d*, and thereby finding that no such contract was ever ent*r*red into between this defendant and the plaintiff herein, and it is alleged by the plaintiff herein, in the petition filed in this case.

Thereupon the County Judge of Kingfisher County, Territory of Oklahoma, duly rendered a judgment for this defendant, giving him restitution of the premises above described, and that this defendant should recover his costs in the premises, and this defendant states that the verdict of the jury in said cause, and the judgment rendered thereon by the County Judge of Kingfisher County, Territory of Oklahoma, is a complete bar to the prosecution of this action, for the reason all of the matters and controversies set up by plaintiff in this action were fully litigated and adjudicated in said action of forcible entry and detention between the parties to this suit, and this defendant states that plaintiff is estopped from the further prosecution of this action, and the court had jurisdiction of the parties and the subject matter, and said judgment is now in full force and unappealed form.

Fifth Defense.

Further answering this defendant says that on the — day of — 1902, this defendant brought an action in the County Court of Kingfisher County, Territory of Oklahoma, in which this defendant was plaintiff and the plaintiff herein, John F. Haffner, was defendant in which this defendant alleged that the plaintiff herein had appropriated all of the growing crop on this defendant's farm above described, for the year 1902, without any right or authority of law whatever, and on account thereof this defendant asked judgment against this plaintiff for the sum of $400.00. This defendant avers that
58 said John F. Haffner, the plaintiff herein, who was defendant in said suit, denied that he owed this defendant any sum of money whatever on account of having appropriated the crop harvested on said premises for the year 1902, alleging that he had purchased said premises from this defendant on or about September 4, 1902, under which alleged contract he claimed to be entitled to the possession of said premises and the crop for the year 1902, and denied that he owed this defendant any sum of money whatever.

Thereupon the Court having jurisdiction of the subject matter and of the parties to the controversy, evidence was introduced by this defendant, and also by the plaintiff herein, wherein the plaintiff set up the identical alleged contract set up in the petition herein, that he claimed to have purchased said premises; that he was entitled to the possession thereof, and entitled to crop for the year 1902, and claimed in said suit that there was but one alleged contract under which he claimed both the farm and the wheat stored upon said farm, and claimed that there was but one transaction between this defendant and the plaintiff, and that in fact, only one contract was alleged to have been made, and that said alleged contract extends to the whole subject matter of the controversy between the parties, and this defendant states that the only question litigated was the alleged contract set up by the plaintiff in this suit in the petition filed herein, which was absolutely denied by this defendant. After hearing all the evidence, and after argument of counsel, and a full submission of said cause and after a full consideration of all the claims made by the plaintiff herein, who was defendant in said suit, the Court rendered a judgment against this plaintiff and in favor of this defendant for the full claim of this defendant against the plaintiff herein, in said suit, the court finding that no such alleged contract had ever been entered into, and that this defendant was
59 entitled to recover from this plaintiff the crops so wrongfully and fraudulently appropriated for the year 1902.

Wherefore this defendant states that all of the alleged claims of the plaintiff herein against this defendant were fully litigated and adjudicated in said action, and the judgment rendered in said action is a finality as to all matters of controversy between the parties herein, and said judgment in said cause is a complete bar to the further prosecution of this action, and plaintiff is estopped from further litigating said identical matters already litigated and adjudicated in said suit. This defendant states that said judgment is in

full force at the present time and unappealed from and binding between the parties.

Wherefore, This defendant prays that this action be dismissed and that title to said premises be quieted in this defendant, and that he recover his costs herein expended.

MICHAEL DOBRINSKI, *Defendant,*
By —— ——, *Attorneys.*

60 TERRITORY OF OKLAHOMA,
County of Kingfisher, ss:

Michael Dobrinski, being first duly sworn, deposes and says that he is one of the defendants herein and that he has read the foregoing answer and knows the contents thereof and that the allegations therein contained are true as affiant verily believes.

MICHAEL DOBRINSKI.

Subscribed in my presence and affirmed before me this 23rd day of March, 1903.

E. M. HEGLER,
Clerk of District Court,
By GEO. H. LAING, *Deputy.*

Endorsements: # 2596. John F. Haffner *vs.* Michael Drobinski, *et al.* Separate answer of Michael Dobrinski. Filed March 23rd, 1903. E. M. Hegler, Clerk, By —— ——. Roberts and Bowman & Doyle and Berge, Attorneys for Dobrinski.

61 In the District Court of Kingfisher County, Oklahoma Territory.

JOHN F. HAFFNER, Plaintiff,
vs.
MICHAEL DOBRINSKI and HENRY SHULTZ, Defendants.

Motion.

Comes now the defendant, Michael Drobinski, and moves the court to require the plaintiff to give additional security on account of the Temporary Restraining Order, heretofore granted in said cause, in favor of the plaintiff and against this defendant, for the reason that the restraining order bond, now on file, is insufficient and inadequate.

MICHAEL DROBINSKI,
By ROBERTS & BOWMAN AND
G. W. BERGE, *Attorneys.*

Endorsements: # 2596. Haffner *vs.* Drobinski. Motion. Filed March 28, 1903. E. M. Megler, Clerk, By George H. Laing, Deputy.

62 And thereupon on March 28, 1903, the defendant, Michael Dobrinski, filed his motion for additional security on injunction Bond and moved the Court orally to dissolve said injunction. Which said oral motion was by the Court overruled. Which said ruling of the Court is in words and figures as follows:

"And now on this 28th day of March, 1903, the above cause coming up for hearing upon the question of increasing the bond to protect the defendant, Dobrinski, and after the court being fully advised, over-rules said motion to dissolve temporary restraining order, and holds the restraining order intact, providing that the plaintiff give a bond in the sum of $1000 in ten days from this date with good and sufficient sureties, to be approved by the Clerk of the District Court, and if no bond be given within ten days, the Restraining Order is Dissolved.

In case of appeal by Plaintiff from the above order, a bond of $1000 to be given. To al- of which the plaintiff excepted and objected and exception allowed. And thereupon, the plaintiff, Haffner, moved the Court to make the injunction heretofore granted in this case perpetual, which said motion was over-ruled, to which said ruling the plaintiff, Haffner, objected and excepted and exception allowed. Motion for a new trial and rehearing of this motion was over-ruled and excepted to by plaintiff and exceptions allowed and twenty days given for appeal and to serve case-made in Supreme Court, five days to suggest amendments and to be settled upon five days' notice.

C. F. IRWIN, *Judge.*

63 And thereafter, to-wit, on the 16th day of October, 1903, the plaintiff filed his motion to strike Separate Answer from the files for the reason that the same was not properly signed. Which motion and endorsements thereon are in words and figures as follows, to-wit:

64 In the District Court in and for the County of Kingfisher, Territory of Oklahoma.

JOHN F. HAFFNER, Plaintiff,
vs.
MICHAEL DOBRINSKI and HENRY SHULTZ, Defendants.

Motion to Strike Answer from the Files.

Now comes the plaintiff, John F. Haffner, and moves the Court to strike the Separate Answer of Michael Dobrinski to the Amended Petition filed herein from the files for the reason that said Separate Answer to the amended petition is not signed by the defendant or his attorney.

W. A. McCARTNEY,
Attorney for Def't.

Endorsements: No. 2596. In the District Court in and for Kingfisher County, Oklahoma Territory. John F. Haffner, plaintiff, *vs.*

Michael Dobrinski and Henry Shultz, Defendants. Motion to strike Answer from the files. Files this 16th day of October, 1903. E. M. Hegler, Clerk.

65 And thereafter on the 17th day of October, 1903, the defendant, Henry Shultz, filed his appearance and Separate Answer. Which appearance and Separate Answer, with all endorsements thereon, are in words and figures as follows, to-wit:

66 In the District Court of Kingfisher County, Territory of Oklahoma.

JOHN F. HAFFNER, Plaintiff,
vs.
MICHAEL DOBRINSKI and HENRY SHULTZ, Defendants.

Voluntary Appearance.

Comes now the defendant, Henry Shultz, and hereby enters his voluntary appearance in this cause, and waives the issuance and service of summons upon him.

HENRY SHULTZ.

Endorsements: # 2596. John F. Haffner, Plaintiff, *vs.* Michael Dobrinski, *et al.*, Defendants. Voluntary Appearance. Filed October 17th, 1903. E. M. Hegler, Clerk.

67 In the District Court of Kingfisher County, Territory of Oklahoma.

JOHN F. HAFFNER, Plaintiff,
vs.
MICHAEL DOBRINSKI and HENRY SHULTZ, Defendants.

Separate Answer of Henry Shultz.

Comes now the defendant, Henry Shultz, and for his separate answer says:

1st. Admits that on or about the summer of 1901, defendant, Michael Dobrinski, by warranty deed conveyed the premises described in plaintiff's petition to this defendant, but this defendant denies that said conveyance was made by said Dobrinski for the reasons as set forth in plaintiff's petition, but avers the facts to be that said Michael Dobrinski conveyed said premises to this defendant to be used by this defendant for missionary purposes in the church, to which both the defendant, Michael Dobrinski, and this defendant belong, and this defendant says that when he took title to said premises he took title thereto in trust for said missionary cause, and to be used by this defendant for the purposes so stated. Affiant, however, states that when the litigation arose between plain-

tiff and the defendant, Michael Dobrinski, and afterwards during the year 1902, he executed a quit-claim deed to said premises to the defendant, Michael Dobrinski, and this defendant therefore states that at this time he has no interest of whatsoever kind in and to said premises, and by this answer disclaims any interest therein, and asks that he may go hence and recover his costs herein expended.

HENRY SHULTZ, *Defendant,*
By DOYLE & BERGE, *Attorneys.*

Endorsements: In the District Court, Kingfisher County, O. T., J. F. Haffner *vs.* Michael Dobrinski. Separate Answer of Henry Shults. Filed Oct. 17, 1903. E. M. Hegler, Clerk.

68 And now on this 24th day of October, 1903, Court grants Defendant leave to sign answer to amended petition heretofore filed, which order is in words and figures as follows; to-wit:

"And now the Court grants defendant leave to sign Answer instanter and twenty days from date given plaintiff to plead thereto."

69 And now on the 24th of October, 1903, the Court Grants the defendant, Michael Dobrinski, leave to withdraw his motion for a re-hearing on motion to Dissolve Restraining Order, which ruling of the Court is in words and figures as follows:

"And now leave is given to withdraw Motion for a re-hearing on Motion to Dissolve Restraining Order."

And thereupon the Clerk was asked to note the appearance of F. W. Jacobs as attorney for defendants. Which entry was made in words and figures as follows:

"Now comes F. W. Jacobs and enters his appearance as attorney for defendants."

And now comes the plaintiff and moves the court to strike from the files the second, third and fourth, fifth defense contained in the Separate Answer of Michael Dobrinski to the Amended Petition, and to require the defendant to separately state and number the different defenses contained in his first defense. Which said motion was by the Court sustained and which ruling of said Court was in words and figures as follows, to-wit:

"Now the plaintiff presents his motion to strike out the last four causes of defenses of defendant's answer and compel the defendant to separately state and number his defenses in said answer and the Court after having heard the argument of counsel and being fully advised in the premises sustains said motion and the defendant excepts, and the defendant is given until Tuesday, March 15, to determine as to time to amend."

70 And thereafter, to-wit, on the 14th day of March, 1904, the defendant, Michael Dorbinski, filed his separate answer in two paragraphs, separately stating and numbering his defenses. Which said separate answer, together with the endorsements thereon, are in words and figures as follows, to-wit:

71 In the District Court of Kingfisher County, Territory of Oklahoma.

JOHN F. HAFFNER, Plaintiff,

vs.

MICHAEL DOBRINSKI and HENRY SHULTZ, Defendants.

Separate Amended Answer of Michael Dorbinski.

Par. 1. Comes now the defendant, Michael Dobrinski, after leave first asked and obtained from the Court, makes this his amended answer by paragraphing and stating the same under the rules of the said Court and for the first p-ragraph of defendant's amended answer to plaintiff's amended petition and cause of action filed herein, says that he denies generally and specifically each and every and all allegations in said petition contained not by him expressly and specifically hereinafter admitted. This answering defendant expressly and specifically admits that on the 4th day of September, 1901, he was the owner of the southwest quarter of section 31, township seventeen, north of range nine, west, situate in Kingfisher County, Oklahoma Territory; admits that he was the legal owner of 1650 bushels of wheat and 30 bushels of oats and that said wheat and oats were stored in a granary on this defendant's farm above described; admits that on September fourth, 1901, the defendant Shultz was holding the legal title to the said land in trust for this defendant.

Par. 2. And for this second and further defense and paragraph of answer to plaintiff's petition and cause filed herein this defendant says that on or about the first of September, 1901, he leased the south-west quarter of section thirty-one, township seventeen, north of range nine, west, situate in Kingfisher County Oklahoma Territory, the same land described in plaintiff's petition and the first paragraph of this answer, to one Fahrensbruch for the period of one year and that he gave to the said Fahrensbruch possession of the said premises during all the fall of 1901 to put in wheat; that the said
72 Fahrensbruch took and had possession of the said land and put in a large portion of the said land in wheat shortly after making the said lease this defendant left the Territory of Oklahoma; that this defendant at the time of leaving his said place and the Territory left on the said premises the said wheat mentioned in plaintiff's petition and also the said oats in defendant's granary nailed up. That during the defendant's absence, to-wit, on the — day of January, 1902, this said plaintiff did unlawfully and by force threat and intimidation enter the above described real estate and without color or right of title disposses- this defendant's said tenant from the said described premises and broke open the said granary and without right or title took out and possessed himself, the said plaintiff, of the said wheat and oats and has ever since unlawfully and forcibly by threats and intimidations and by force kept this defendant out of possession of said land and by said means as aforesaid has held possession of the said premises and that in this

away and no other has the said plaintiff possessed himself of the said property and that not under contract of any kind or agreement.

Wherefore, this defendant prays that this action be dismissed and that the title to said premises be quieted in this said defendant and that he recover his costs herein expended.

F. W. JACOBS,
Attorney for Defendant Michael Dobrinski.

In the District Court of Kingfisher County, Territory of Oklahoma.

JOHN F. HAFFNER, Plaintiff,
vs.
MICHAEL DOBRINSKI and HENRY SHULTZ, Defendants.

Michael Dobrinski being duly sworn says that he has read the foregoing prefixed answer to the plaintiff's petition; that he knows the statements contained in the said answer and that the same are true. That he is defendant in the said cause.

Subscribed and sworn to before me this — day of March, 1904.

Endorsements: #2596. District Court, Kingfisher County, O. T. John F. Haffner, Plaintiff, *vs.* Michael Dobrinski, Defts. Amended Answer of Dorninski. Filed March 14, 1904. E. M. Hegler, Clerk.

73 And thereafter, on the 15th day of March, 1904, the attorney for defendant, in open Court request and had the clerk make the following entry on his minutes, which are in words and figures as follows, to-wit:

"And now comes the defendant in open Court and withdraws the second paragraph of his amended answer and elects to stand upon the first paragraph a general denial by leave of court first obtained."

That thereafter on the 17th day of May, 1904, this cause came on for trial. Plaintiff present in person and by his attorneys, P. S. Nagle and W. A. McCartney, and the defendant present in person and by his attorney, F. W. Jacobs. And thereupon the plaintiff introduced evidence for the purpose of proving his case and the allegations contained in said petition. And thereupon the defendant objected to the introduction of the evidence for the reason that the petition did not state facts sufficient to constitute a cause of action. Which said objection was by the Court sustained. To which said plaintiff excepted and exceptions allowed. And thereupon the plaintiff filed his motion to set aside the judgment of the Court and the ruling of the Court and to grant the defendant a new trial. Which said motion for a new trial was in words and figures as follows, to-wit:

74 In the District Court of Kingfisher County, Territory of Oklahoma.

JOHN F. HAFFNER, Plaintiff,
vs.
MICHAEL DOBRINSKI and HENRY SHULTZ, Defendants.

Motion for New Trial.

Now comes the plaintiff and moves the Court to set aside and vacate the ruling sustaining the objection to the introduction of evidence and the order dismissing said petition at the cost of plaintiff, and to grant the plaintiff a new trial, for the following reasons, to-wit:

First. Because of irregularities in the proceedings of the Court by which the plaintiff was prevented from having a fair trial.

Second. Because of irregularities in the proceedings of the prevailing party.

Third. Because of misconduct of the prevailing party.

Fourth. Because of surprise or accident which ordinary prudence could not have guarded against.

Fifth. Because the decision of the Court is contrary to law.

Sixth. Because of errors of law occur-ing at the trial and excepted to by the plaintiff.

Seventh. Because said Court had no jurisdiction on the 17th day of May, 1904, to render a judgment sustaining the objection to the introduction of testimony under plaintiff's petition by the defendant, for the reason that other terms of said Court had in other counties in said Second Judicial District intervened between March, 1904, term of said court and the day of said pretended term of Court was held in Kingfisher on the 17th day of May, 1904.

Eighth. Because said Court had no jurisdiction to consider said cause or any motion made therein on said 17th day of May, 1904, for the reasons set out in number seven.

Ninth. Because said Court had no jurisdiction to dismiss
75 the petition on the 17th day of May, 1904, for the reason that said Court was not legally in session; terms of court in other counties in the same district having intervened between the March, 1904, term and the term of said Court on the 17th day of May, 1904.

W. A. McCARTNEY,
Attorney for Plaintiff.

#2596. In District Court of Kingfisher County, Oklahoma Territory. John F. Haffner, Plaintiff, *vs.* Michael Dobrinski, *et al.* Motion for a new trial. Filed this 17th day of May, 1904. E. M. Hegler, Clerk District Court, By George H. Laing, Deputy.

76 And thereupon the motion for a new trial was over-ruled. To which over-ruling the plaintiff then and there excepted and exceptions were allowed; ninety days given in which to prepare

and serve case-made; ten days to suggest amendments; to be settled on five days' notice. Execution to be stayed pending the taking of appeal, upon bond in the sum of $500 being executed by said plaintiff and approved by the Clerk of said Court; thirty days given in which to file said bond and execution stayed during said thirty days. A Journal entry of which is in words and figures as follows: to-wit:

77 In the District Court in and for the County of Kingfisher, O. T.

JOHN F. HAFFNER, Plaintiff,
vs.
MICHAEL DOBRINSKI and HENRY SHULTZ, Defendants.

Journal Entry.

This cause comes on regularly for trial before the Court on the 17th day of May, 1904. P. S. Nagle and W. A. McCartney appearing for the plaintiff, and F. W. Jacobs for the defendant, Michael Dobrinski, and the plaintiff and Michael Dobrinski, the defendant, both appearing in their own proper persons and both parties announcing to the Court that they were ready for the trial of the cause.

Whereupon the plaintiff offered evidence in the said cause. Whereupon the defendant objected to any evidence in the said cause for the reason that plaintiff's petition did not state facts sufficient to constitute a cause of action and failed to state a cause of action.

Whereupon after due consideration the Court sustained the objection of the defendant.

Whereupon the plaintiff objected and objections allowed. Whereupon the Court held that the plaintiff failed to state equity and dismissed the said cause at the cost of the plaintiff. Whereupon the plaintiff moved for a new trial, which said motion was over-ruled, and the plaintiff given ninety days to prepare a case-made for the Supreme Court and ordered by the Court to indemnify the defendant for rent of the land in controversy in the sum of $500 for one year. That the said bond should be a qualified bond and said judgment is staved for thirty days to allow the plaintiff to give bond.

78 The said bond to be approved by the Clerk of the District Court. Whereupon the plaintiff moved the court to tax certain costs, to-wit, the witnesses fees in the preparation of the trial of fact to the defendant, Michael Dobrinski, whereupon, the Court over-ruled the same because prematurely made, to which the plaintiff excepted and exception allowed. Whereupon moved the Court to perpetuate the injunction had in said cause. Whereupon the Court made the following order: That the said injunction should continue and wait the final disposition of said cause by the Supreme Court and execution stayed pending appeal on bond being made in the sum of $500 as before herein stated. Said bond to be in lieu of

all alias bonds heretofore given as to future damages. That all said matters were duly considered by said Court and all of said orders and judgments made by the Court on the 17th day of May, 1904.

That same is a regular day in Term of said district.

C. F. IRWIN, *Judge.*

Filed May 16, 1905.
BENJ. F. HEGLER,
Clerk Supreme Court.

79 And thereupon the plaintiff filed his affidavit as to the value of the property involved in said litigation. Which affidavit is in words and figures as follows, to-wit:

80 TERRITORY OF OKLAHOMA,
County of Kingfisher, ss:

Comes now John F. Haffner and John Webber who severally make oath and say each for himself that he is well acquainted with the value of the property in dispute in this suit and that the value of said property is more than Five Thousand ($5000) Dollars.

JOHN F. HAFFNER.
JOHN A. WEBBER.

Subscribed and sworn to before me this 18th day of May, 1904.
[SEAL.] OLOVE M. BROWN,
Notary Public.

My commission expires October 21, 1906.

81 And thereupon on the 15th day of August, 1904, the Hon. John H. Burford having before been assigned to the Second Judicial District, the Hon. C. F. Irwin being absent therefrom, made an order extending the time in which to make and serve a case-made. Which said order is in words and figures as follows, to-wit:

82 Now on this 15th day of August, 1904, this cause came on before the undersigned judge of the Second Judicial District, at his Chambers, at Guthrie, O. T., upon motion of the plaintiff for an extension of time in which to make and serve a case-made.

And it appearing to the undersigned Judge that the Hon. C. F. Irwin, Judge of the Second Judicial District, was absent from the said district and from the Territory of Oklahoma and that during his absence the undersigned was assigned to said Judicial District.

And it further appearing to the undersigned Judge that an extension of time should be granted, it is therefore considered and ordered that an extension of ninety days from the 15th day of August, 1904, be granted said plaintiff in which to make and serve a case made, ten days given defendants in which to suggest amendments; case to be settled on five days from either side.

JOHN H. BURFORD, *Judge.*

Filed May 16, 1905.
BENJ. F. HEGLER,
Clerk Supreme Court.

Endorsements: # 2596. In the District Court of Kingfisher County, Oklahoma. John F. Haffner, Plaintiff, *vs.* Michael Dobrinski and Henry Shultz, Defendants. Order extending time in which to make and serve case-made. Filed this 15th day of August, 1904. E. M. Hegler, Clerk of District Court. By George H. Laing, Deputy.

83 In the District Court in and for the County of Kingfisher and the Territory of Oklahoma.

JOHN F. HAFFNER, Plaintiff,
vs.
MICHAEL DOBRINSKI and HENRY SHULTZ, Defendants.

I have hereby examined the foregoing case-made and have the following amendments to suggest:

That in line 3, page 70 of the case-made the word "evidence" be stricken out and in line 7 of the Certificate of the Judge the word "evidence" be stricken out. That otherwise I find the case-made to be correct.

G. W. BERGE &
E. L. HOTCHKISS,
Attorneys for Defendants.

Filed May 16, 1905.
BENJ. F. HEGLER,
Clerk Supreme Court.

84 The foregoing contains a true, full, correct and complete statement of all pleadings, demurrers, motions, orders, rulings, findings, objections, exceptions, judgment and proceedings upon which judgment was rendered.

P. S. NAGLE &
W. A. McCARTNEY,
Attorneys for Plaintiff.

Filed May 16, 1905.
BENJ. F. HEGLER,
Clerk Supreme Court.

TERRITORY OF OKLAHOMA,
Kingfisher County, ss:

I, the undersigned attorney for defendant, Michael Dobrinski, in the foregoing suit, certify that the foregoing case was duly served upon me this 12th day of October, 1904.

HARPER S. CUNNINGHAM &
F. W. JACOBS,
Attorneys for Defendant Michael Dobrinski.

Filed May 16, 1905.
BENJ. F. HEGLER,
Clerk Supreme Court.

TERRITORY OF OKLAHOMA,
Kingfisher County, ss:

I, the undersigned attorney for defendant Henry Shults, in the foregoing suit, certify that the foregoing case was duly served on me this 12th day of October, 1904.

F. W. JACOBS &
HARPER S. CUNNINGHAM,
Attorneys for Defendant Henry Shults.

Filed May 16, 1905.
BENJ. F. HEGLER,
Clerk Supreme Court.

This is to certify that the foregoing above case-made and the amendments thereto have been duly served in due time and the amendments thereto duly suggested and the same duly submitted to me for settlement and signing as required by law by the parties to said cause. That the same as above set forth and as corrected by me is true and correct and contains a true and correct statement of all the pleadings, motions, orders, findings, proceedings and exceptions and judgments had in such cause and I hereby settle, allow, certify and sign the same as true and correct case-made for the Supreme Court in said cause and I hereby order that the Clerk of the District Court attest the same with the seal of the District Court and file the same of record.

85 [SEAL.]

Attest:
Witness my hand at El Reno, O. T., this 8th day of May, 1905.

C. F. IRWIN, *Judge.*

E. M. HEGLER, *Clerk,*
By GEORGE H. LAING, *Deputy.*

Filed May 16, 1905.
BENJ. F. HEGLER,
Clerk Supreme Court.

Said Case made is endorsed: No. 1741—In the District Court of Kingfisher County, Oklahoma—John T. Haffner, Plaintiff, *vs.* Michael Dobrinski *et al.*—Defendant—Petition in error and Case Made—No. 1741—Filed this 15 day of May, 1905, E. M. Hegler, Clerk of District Court, by George H. Laing, Deputy—W. A. McCartney, Patrick S. Nagle, Attorney for —— ——.

86 And afterward, at the January, 1906, Term of said Supreme Court, on the Fourth day of January, 1906, the following proceeding was had in said cause, to wit:

1741.

JOHN F. HAFFNER, Plaintiff in Error,
vs.
MICHAEL DOBRINSKI ET AL., Defendants in Error.

Comes now W. A. McCartney, of counsel for plaintiff in error, and makes oral argument herein. And cause is submitted on record, briefs and oral argument.

87 And afterward, at the June, 1906, Term of said Supreme Court on the Sixth day of September, 1906, the following proceeding was had in said cause, to wit:

1741.

JOHN F. HAFFNER, Plaintiff in Error,
vs.
MICHAEL DOBRINSKI ET AL., Defendants in Error.

And now this cause comes on for final decision and determination by the court upon the record and briefs submitted herein.

And the Court having duly considered the same, and being fully advised in the premises, finds: That the judgment of the lower court in this cause should be affirmed, at the cost of plaintiff in error.

It is therefore ordered and adjudged by the Court, that the judgment of the lower court in this cause be and the same is hereby affirmed, at the cost of plaintiff in error.

Opinion by Pancoast, J. All the Justices concurring except Irwin, J., who having tried the case below, not sitting.

88 No. 1741.

In the Supreme Court of the Territory of Oklahoma, June Term, 1906.

Filed September 6, 1906.

JOHN F. HAFFNER, Plaintiff in Error,
vs.
MICHAEL DOBRINSKI and HENRY SHULTZ, Defendants in Error.

Syllabus.

1. Specific Performance—Objection to Introduction of Evidence.—Where the only objection made to a petition is by objecting to the introduction of evidence at the trial, the court will determine only whether or not the petition states a cause of action in equity, and if the facts pleaded are sufficient, and in their nature properly cognizable by a court of equitable jurisdiction, the objection will ordinarily be overruled.

2. Same—Pleading—Relief Refused, When.—In such case, however, it is essential that the one insisting on specific performance make out a complete equity on his part, and to that end, he must show that the contract sued upon *is* one which appeals in all its features to the judicial discretion as being fit to be specifically enforced; and where it is disclosed by the petition that the contract sought to be enforced is unreasonable in its terms, if not unconscionable, and void under the Statute of Frauds, and that the acts done and relied upon to warrant the decree on the ground of part performance are not of such nature that damages would be an inadequate relief, and that the plaintiff has within his control money more than sufficient to compensate him for any loss sustained; *Held*, That a case for equitable intervention is not shown, and upon such allegations in the petition, and objection to the introduction of evidence thereunder is properly sustained.

Error from the District Court of Kingfisher County.
C. F. Irwin, Trial Judge.

Affirmed.

P. S. Nagle and W. A. McCartney, for plaintiff in error.
Berge, Morning & Ledwith, for defendants in error.

Statement of Facts.

This action was brought on the 13th day of May, 1902, by the plaintiff in error, John F. Haffner, against the defendants in error, for the specific enforcement of an oral contract for the sale of real estate. Thereafter, on January 14, 1903, upon the application of the plaintiff in error therefor, a restraining order was issued against the defendant in error Dobrinski, restraining him from prosecuting certain actions of forcible entry and detainer which he had brought against Haffner in the Probate Court of Kingfisher County after the filing of the petition in this case, and which involved the land in controversy herein. This order was made conditional upon Haffner giving bond in the sum of $500.00, which amount was later increased to $1000.00. On March 9, 1903, the court overruled a motion to dissolve this restraining order, and upon the hearing of a demurrer filed by Dobrinski to Haffner's petition, granted leave to the plaintiff in error to amend. On March 18, 1903, by leave of court, Haffner filed an amended petition, upon which the case was heard, which, in substance, is as follows:

That on and prior to September 4, 1901, Dobrinski was the owner in fee of the East Half and Lots 3 and 4 of Sec. 31, tp. 17, Range 9, West of the Indian Meridian, in Kingfisher County, Oklahoma, and also 1668 bushels of wheat and 30 bushels of oats. That on said date, Haffner and Dobrinski entered into a verbal contract for the sale and purchase of said land and personal property, for a

total consideration of $3820.00, of which $920.00 was for the oats and wheat. A payment of $1020.00 was to be made on or before January 1, 1902, $600.00 of which was to be applied by Dobrinski on a mortgage then on the premises, and a warranty deed ex-cuted by Dobrinski to the plaintiff in error, Haffner. At the same time Haffner, upon the execution of said deed, was to execute to Dobrinski his note for $2800.00, bearing 5 per cent. interest per annum,
89 payable in ten years, Haffner to bind himself to apply upon the said indebtedness all of the proceeds arising from the crops raised upon said land, over and above cost of raising the same. That in pursuance of said oral contract, Haffner paid Dobrinski $50.20, and on the day following, September 5, 1901, took peaceable possession of the premises and personal property, made minor improvements about the farm, planted about $60.00 worth of trees, and sowed one hundred acres of the land to wheat and ten acres to oats.

The petition then alleges that Dobrinski on November 30, 1901, conveyed the premises by warranty deed to one John A. Webber, for the consideration of $1700.00, and that Webber later on, for a consideration unknown to the plaintiff, Haffner, at the instance of Dobrinski, deeded the land to the defendant in error Shultz. Shultz, however, is alleged to have quit claimed back to Dobrinski, and to have held in the interim in trust for Dobrinski. The petition then recites that prior to the 1st of January, 1902, at which time the payment of $1020.00 was to be made, Haffner notified Dobrinski that he was ready and willing to make payment, and that he was at that time and ever since has been ready, willing and able to pay said sum, less the payment of $50.20 theretofore made, but that Dobrinski refused and still refuses to accept the same. That Haffner has at all times been able, ready and willing to comply with his contract, and offers to bring into court the said $1020.00, less $50.20 paid, and to execute to Dobrinski his note for $2800.00 secured by first mortgage on the real estate, and in addition thereto, to bring into court the sum of $458.76, which it is alleged is the proceeds of the farm, over and above outlay for help, while Haffner has held the same. Continuous possession of the premises on the part of Haffner since September 5, 1901, is then alleged, and the petition concludes in this language:

"That no just, fair or adequate assessment of damages could be made, and that the defendant Michael Dobrinski, is not financially responsible for any adequate amount of damages, and that the plaintiff has no plain and adequate remedy at law", followed by a prayer for an order directing Dobrinski to execute a warranty deed in accordance with the terms of the contract.

To this amended petition, Shultz filed what is in effect a disclaimer. After various delays, occasioned by motions to strike out portions of the first answer, Dobrinski filed an amended answer in two paragraphs, and later withdrew the second paragraph, and stood upon the first alone. This paragraph of Dobrinski's amended answer admits his ownership of the premises and personal property on September 5, 1901, and admits that Shultz held the land in trust

for him, and then contains a verified general denial as to all the other allegations in the amended petition. At the trial, Dobrinski objected to the introduction of any evidence, "for the reason," as the record recites, "that the petition did not state facts sufficient to constitute a cause of action against the defendant and in favor of the plaintiff." This objection was by the court sustained, exception saved, motion for new trial filed and overruled, and the case brought here for review.

Error is predicated upon the sustaining of the objection to the introduction of evidence, and also upon the refusal of the court below to make perpetual the restraining order above referred to, and because of the fact that plaintiff in error was required to give bond when the order was obtained. In their brief, counsel for plaintiff in error enter into an extended argument to sustain their contentions, first, that oral contracts in general, relative to the sale of real estate, are not absolutely inhibited by our statute of frauds, and second, that if the statute applies, the contract declared upon and sought to be enforced in this action is not within its scope, by reason of part performance thereof.

Opinion of the court by

Pancoast, J.: The first five errors assigned depend upon the correctness of the ruling of the court below in sustaining the objection to the introduction of evidence, and may be conveniently considered together. It will be noted from the foregoing statement of facts that no demurrer was filed to the amended petition, nor was
90 any attempt made by answer to take advantage of any defect in the petition, the question of the sufficiency of the averment of the petition being raised by objection to the introduction of evidence. When the only objection made to a petition is as in the case at bar, by objecting to the introduction of evidence at the trial, the court will look to determine only whether or not the petition states a cause of action in equity, and if the facts pleaded are sufficient and in their nature properly cognizable by a court of equitable jurisdiction, *and* the objection ordinarily will be overruled.

In the investigation of a pleading, in such case, it is well to bear in mind certain settled principles touching the relief sought. It is well settled doctrine that specific performance is never demandable as a matter of absolute right, and the proof or pleading of a valid legal contract is not of itself enough to entitle one to a decree, for it lies within the sound discretion of a court of equity to grant or refuse to specifically enforce a contract which is good at law, according to the facts, of each particular case.—Fish *v.* Leaser, 59 Ill., 394; King *v.* Hamilton, 4 Pet. (U. S.) 328; Hennessey *v.* Woolworth, 128 U. S., 438.

It is an essential consideration that the one insisting on specific performance make out a complete equity on his part, and to that end, he must show that the contract sued upon is one which, in all its features, appeals to the judicial discretion as being fit to be specifically enforced.—Bruck *v.* Tucker, 42 Cal., 347; Chapman *v.* Morgan, 55 Mich., 124.

And where, as in the case at bar, it is disclosed by the applicant himself in his petition that the contract upon which the action is based is unreasonable in its provisions, if not unconscionable, and void under the Statute of Frauds, and that the acts done and relied upon to warrant a decree on the ground of part performance are not of such a nature that damages would be an adequate relief, but, on the contrary, that he has within his immediate control money and property more than sufficient to compensate him for any loss sustained, a case for equitable intervention is not shown, and upon such state of facts, a court of equity is justified in refusing specific performance.

It is unnecessary that this court discuss the proposition of whether all oral contracts relating to the sale of real estate are or are not absolutely inhibited by the Statute of Frauds in force in this Territory, as the question presented under this head, is, whether or not, upon the allegations of the petition in question, the relief sought should have been accorded or denied. Apart from the consideration of any question arising out of the Statutes of Frauds, from a careful scrutiny of the contract before us, as shown by the petition, it would seem the trial court was fully warranted in refusing to require it to be specifically performed. The petition shows that the total purchase price for the real estate was to be $2900.00; that as a part of the same contract, the defendant in error sold to the plaintiff in error wheat and oats to the value of $920.00; and that but $50.20 was paid on the purchase price. It also appears that the plaintiff in error was to pay $1020.00 on or before the 1st day of January, 1902, which was the January following the date of the contract, leaving him to pay but $100.00 in cash out of his own resources, over and above the proceeds of the wheat and oats above mentioned. For this $100.00 he was to go into possession, and have the use of the farm, of the value of $2900.00, and was to have ten years in which to pay the balance of the purchase price, at 5% interest, the interest not being payable until the expiration of the ten year period. It is true there is a provision of the contract by which the plaintiff below agreed to pay upon the remainder of the purchase price the net profits, arising from the farm, but what method had Dobrinski, the defendant below, of enforcing this one-sided provision, and wherein was Haffner obligated to pay this profit until the ten years had expired? The practical operation of the contract is that upon paying but $150.20 upon the purchase price in addition to the value of the wheat and oats turned over to him, he obtained the use of the farm for a period of ten years, at 5 per cent. interest, neither
91 the interest nor the net profits to be paid over until the expiration of the ten year period.

As well said by counsel for defendant in error in his brief, the contract wants mutuality, both as to these obligations and as to the equitable remedy of specific performance. No obligation- are imposed by it upon the purchaser; he is not bound to cultivate the farm, nor refrain from turning it over to any irresponsible or incapable person he chooses.

There is no way by which the court or anyone else can determine

the amount expended by the purchaser for help under the contract, but it lies wholly within his control to render the net profits of the farm little or nothing, by the employment of any number of persons his fancy may dictate, at whatever wages he may see fit to give, with no right in the defendant in error, under his contract, to say aught upon that point. It is a fundamental principle of specific performance that the right thereto must be mutual, and where the contract is, as here, not practically enforceable by the court as to both parties, equity will not enforce it unjustly against one alone.—Bulk *v.* Smith, 29 Mich., 166; Iron Age Pub. Co., *v.* Western Union T. Co., 3 Am. St. R. 758; Pomeroy on Contracts, Secs. 162-165; O'Brien *v.* Perry, 62 Pac. 927; Blanchard *v.* Detroit R. R. Co., 31 Mich., 43.

As remarked by Chancellor Edward Sugden in an English case, "The court acts only on the principle of executing the contract in specie, and in the very terms in which it has been made. Therefore, when you come to the specific execution of a contract containing many parts, you must see that it is possible to execute it effectively. The court cannot say that when an event arises hereafter it will then execute it." As in that case, the court in this action could only require the execution of a portion of the contract, whereas it is bound in law to require the execution of all. A decree now would not be a specific execution of the contract, but only a declaration that there ought to be a specific execution of it hereafter.

Not only that, but when, as here, part performance is relied upon to take the contract out of the Statute of Frauds, the nature of the acts constituting such part performance must be looked to in determining whether or not equity will intervene. Ordinarily, when there has been a part performance of an oral contract for the sale of real estate, it may be enforced in equity where the acts done in part performance are difficult to compensate in damages. But, according to the better doctrine, in order that specific performance may be decreed on this ground, the acts done by the one seeking relief and relied on the warrant a decree, must be of such a nature that damages would not be an adequate relief.—Williams *v.* Morris, 95 U. S., 444; Baldwin *v.* Squier, 31 Kans., 283; Brown *v.* Hoag, 35 Minn., 373.

But what are the acts pleaded in the petition by way of part performance, in this case? None, save that the purchaser paid the mere nominal sum of $50.20 upon the purchase price, entered into possession of the property, did those small acts of repairing common to all farmers, expended but sixty dollars in improvement, and prepared one hundred and ten acres for crop, all acts of such a nature that it would seem the money he pleads he has in his possession belonging to the defendant in error must be adequate to cover them many times over. As the plaintiff below alleges in his petition, he has in his own control the $920.00 realized from the sale of the wheat and oats, and in addition thereto, the sum of $458.76, the first year's returns from the farm above the cost of obtaining it, while, as before stated the only damages he could possibly sustain, under the conditions shown, are the small amounts, if any, expended for planting of trees and other minor improvements, and the time he has lost.

By his own statements, he has within his own control adequate compensation for whatever loss he has sustained by reason of Dobrinski's noncompliance with the contract. He is not the one entitled
92 to relief by his own words, it seems he has lived on the farm free for over a year; has almost $1400.00 of the other's money in his hands, and now complains in equity that fraud will be perpetrated upon him if the court does not enforce a contract which will allow him to remain nine years longer in possession of the land, free from any obligations with which the defendant in error can force him to comply, until the expiration of that time. It is not a condition that appeals to equitable consideration, so far as the plaintiff in error is concerned; and under the allegations of the petition, we think the trial court was amply justified in sustaining the objection to the introduction of any evidence.

The remaining assignments of error go to the granting of an injunction by the court. It appears from the record that after this action was brought in the District Court of Kingfisher County, the defendant below, Dobrinski, commenced certain actions against the plaintiff in error, Haffner, in the Probate Court, for forcible entry and detainer. The court restrained the plaintiff in those suits from prosecuting them further, but required the defendant, Haffner, to give bond, and later refused to make the injunction perpetual. It is urged by counsel for the plaintiff in error that the injunction should have been made perpetual, and this, too, without bond on the part of Haffner.

We see no merit, however, in these contentions, as by Sec. 4429, Wilson's Stat. 1903, it is provided that "no injunction shall operate until the party obtaining the same shall give an undertaking in an amount fixed by the court or judge allowing the same, to secure to the party the damages he may sustain if it be finally decided that the injunction ought not to have been granted." And as to the refusal of the court to make the injunction perpetual, that question cannot be considered here. Time was given within which to appeal from the order refusing to make the injunction perpetual, and no appeal having been taken from that order within the time allowed, the action of the trial court in that respect cannot be reviewed.

For the reasons herein given, the judgment of the court below is affirmed. All the Justices concurring, except Irwin, J., who, having tried the case below, not sitting.

93 UNITED STATES OF AMERICA,
Territory of Oklahoma.

In the Supreme Court of said Territory, June, 1906, Term.

JOHN F. HAFFNER, Plaintiff in Error,
vs.
MICHAEL DOBRINSKI and HENRY SHULTZ, Defendants in Error.

Petition for Re-hearing.

P. S. Nagle and W. A. McCartney, Attorneys for Plaintiff in Error.

Filed Sep. 21, 1906. Benj. F. Hegler, Clerk Supreme Court.

94 UNITED STATES OF AMERICA,
Territory of Oklahoma.

In the Supreme Court of said Territory, June, 1906, Term.

JOHN F. HAFFNER, Plaintiff in Error,
vs.
MICHAEL DOBRINSKI and HENRY SHULTZ, Defendants in Error.

Petition for Re-hearing.

Comes now John F. Haffner, Plaintiff in Error, and respectfully represents to the Court, that on the 6th day of September, 1906, a decree and judgment was rendered by this Court in said cause affirming the decision of the Court below; that said decision overlooked the questions:

95 & 96 First: "That the statutes of Oklahoma do not render invalid a contract for the sale of real estate."

Second: "That possession of real estate under a verbal contract for the sale thereof takes the contract out of the statute of Frauds and Perjuries."

Third: "The objection to the introduction of any testimony for the reason that the petition does not state facts sufficient to constitute a cause of action ought to be overruled where the petition does state facts sufficient to constitute a cause of action, even though the relief prayed for in the petition is different from that to which the plaintiff is entitled by the statement of facts in his petition."

That said decision is in conflict with the following authorities not heretofore cited in the brief or referred to in oral argument:

Nelson Story *vs.* Madison M. Black and another, 1st Pac. Page 1.
Laith *vs.* McDonald, 7th Kansas, 254.
Moody *vs.* Arthur 16 Kansas, 426.
Railroad Company *vs.* Stone, 54 Kansas, 83.
Mills *vs.* Mickers, 50 Pac. 976.

Wherefore plaintiff in error prays that a re-hearing of said cause may be had by your honorable Court.

P. S. NAGLE,
W. A. McCARTNEY,
Attorneys for Plaintiff in Error.

97 And afterward, at the January, 1907, Term of said Supreme Court, on the nineth day of January, 1907, the following proceeding was had in said cause, to wit:

No. 1741.

JOHN F. HAFFNER, Plaintiff in Error,
vs.
MICHAEL DOBRINSKI *et al.*, Defendants in Error.

Ordered by the Court, that the petition for a rehearing of this cause be and the same is hereby denied.

98 UNITED STATES OF AMERICA,
State of Oklahoma, ss:

Certificate.

I, W. H. L. Campbell, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the foregoing 97 pages numbered from 1 to 97, inclusive are a true and complete transcript of the record and all proceedings in said Supreme Court in the case of John F. Haffner, Plaintiff in error, *vs.* Michael Dobrinski and Henry Shultz, Defendants in error, as the same remains on file and of record in my office.

In witness whereof, I hereto set my hand and affix the seal of said Supreme Court, at Guthrie, this 25th day of November, 1907.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk Supreme Court of the State of Oklahoma.

Endorsed on cover: File No. 20,925. Oklahoma Territory supreme court. Term No. 218. John F. Haffner, appellant, *vs.* Michael Dobrinski and Henry Shultz. Filed December 7th, 1907. File No. 20,925.

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Office Supreme Court, U. S.
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JAMES H. MCKENNEY,
CLERK.

Supreme Court of the United States,

OCTOBER TERM, 1908.

No. [redacted]35.

JOHN F. HAFFNER, APPELLANT,

vs.

MICHAEL DOBRINSKI AND HENRY SHULTZ,
DEFENDANTS.

BRIEF FOR APPELLANT.

WATSON E. COLEMAN,
I. Q. H. ALWARD,
Attorneys for Appellant.

NAGLE & BLAIR,
D. W. BUCKNER,
Kingfisher, Okla.,
Of Counsel.

THE SAXTON PRINTING CO.

Supreme Court of the United States,

OCTOBER TERM, 1908.

No. 218.

JOHN F. HAFFNER, APPELLANT,

vs.

MICHAEL DOBRINSKI AND HENRY SHULTZ, DEFENDANTS.

STATEMENT OF CASE.

On May 13, 1902, the appellant, John F. Haffner, filed his original petition in the District Court of Kingfisher County, Oklahoma Territory (Record, pp. 6, 7, 8, and 9), and on March 18, 1903, filed an amended and supplemental bill of complaint (Record, pp. 17, 18, 19, and 20), in which he claimed to have purchased on September 4, 1901, under an oral contract, 160 acres of land in Kingfisher County, Oklahoma Territory, together with 1,668 bushels of wheat and thirty bushels of oats, from the defendant Michael Dobrinski, agreeing to pay therefor $3,820, $1,020 to be paid on or before the first day of January, 1902, at which time a warranty deed was to have been executed conveying the land to plaintiff subject to a first mortgage to secure $2,800, payable in ten years at five per cent interest, the balance of the purchase price; that a cash payment of $50.20

was made, and defendant on September 5, 1901, placed the plaintiff in peaceable possession, under said oral contract, of the land, wheat, and oats. That acting upon and under said contract the plaintiff, with the full knowledge and consent of the defendant, entered into possession and has so remained ever since, and began and has continued to make valuable and permanent improvements on said land and to cultivate the soil, etc. Also that the plaintiff has been and is ready and willing and able to perform and execute his part of the contract according to its terms, and offers to pay in the court the amount now due under the contract, but that defendant has declined, refused and still refuses to perform his contract. The plaintiff prays to have his contract specifically enforced.

The defendant, Drobinski, filed an answer, the first paragraph of which amounted to a general denial, the rest having been withdrawn (Record, 33).

The defendant Shultz disclaimed any interest (Record, 31).

At the hearing the defendant objected to the introduction of evidence for the reason that "the petition did not state facts sufficient to constitute a cause of action, and failed to state a cause of action," which objection was sustained and the cause dismissed (Record, 36).

This decision was affirmed by the Supreme Court of the Territory of Oklahoma by its decision of September 6, 1906. And plaintiff appeals to this court (Record, 40-46).

The record in this cause appears needlessly long, but this brief statement is believed to contain a summary of all the facts material to this appeal. No reference is made to any other proceedings which may have been had between the parties for the reason that they were not pleaded by the defendant below and are consequently not properly before this court.

BRIEF IN OPPOSITION TO MOTION TO DISMISS.

As to the first contention of appellees that no bond of any kind has been filed, appellant is ready and willing to

file a proper bond, if the same is deemed necessary, and prays that the same may be approved *nunc pro tunc*. In this connection attention is directed to the fact that none of the authorities cited by appellees hold that the failure to file a bond deprives the court of jurisdiction, but merely that it may be a ground for dismissal if the appellant refuses to file a bond within a limited time, which in this case he does not do.

As was said by Mr. Chief Justice Waite in Brown *vs.* McConnell, 124 U. S., 489, one of the cases cited by appellee.

> "The taking of security is not jurisdictional in its character, and its omission affects only the regularity of the proceeding. Such being the case permission to supply it here may properly be given in furtherance of justice."

To the same effect are all the other cases cited by appellees.

The second contention of appellees that the amount in controversy is less than $5,000 does not appear to merit much consideration. The appellees by their affidavits admit that the value of the land alone approximates $4,000. In addition the value of the wheat and oats purchased, together with the produce from the land from September 5, 1901, should be taken into consideration, for the reason that if the cause is decided adversely to the complainant he will be responsible therefor. The total amount in controversy will exceed six thousand dollars.

In view of the affidavits on behalf of appellant and the indisputable fact of the material increase in value of the land in controversy, and the value of the produce therefrom and the value of the wheat and oats purchased, it cannot be seriously argued that there is any ground for the motion to dismiss, and appellant prays that the same may be overruled and a hearing had on the merits.

Respectfully submitted,

WATSON E. COLEMAN,

I. Q. H. ALWARD,

Attorneys for Appellant for the Purpose of the Motion.

BRIEF ON MERITS.

ARGUMENT.

The errors assigned are as follows:

1. The findings and judgment of the Court are contrary to the law.

2. The judgment and findings of the Court are contrary to the evidence.

3. The Court erred in not reversing this cause for the manifest error in refusing the plaintiff in error from introducing his evidence under the issues joined in this cause.

4. The Court erred in not reversing this cause for the manifest error by the Court in sustaining the defendant's objection to the evidence offered on behalf of the plaintiff to sustain the issues on his behalf joined.

5. The Court erred in not reversing this cause and giving judgment herein for the plaintiff upon the pleadings and issues joined.

6. The Court erred in not reversing this cause because there was manifest error in dismissing the plaintiff's petition herein.

7. The Court erred in not reversing the judgment of the court below because the plaintiff was required to give an injunction bond.

8. The Court erred in not reversing this cause because the court below failed and refused to make the injunction herein perpetual.

9. The Court erred in affirming the judgment of the court below in this cause.

In the interest of brevity counsel will consider the errors assigned together.

The cause was dismissed "for the reason that the plaintiff's petition did not state facts sufficient to constitute a cause of action and failed to state a cause of action" (Record, 36).

The bill of complaint states that a verbal contract was entered into for the sale of the land, wheat and oats (Record, 17); that a cash payment was made on account of the purchase price, and a time for subsequent payment agreed upon, at which time a warranty deed was to have

been given and a mortgage executed to secure the balance of the purchase price; that the purchaser entered into possession under the contract, with the knowledge and consent of the seller, and that he made permanent and valuable improvements (Record, 18); that the purchaser offered, and appellant still offers, to perform his part of the contract, but that appellee declined to permit him so to do and refused to carry out his contract (Record, 19).

And appellant, relying on his possession and part performance under the contract, prayed that he might have specific performance of the contract (Record, 20).

The contention of appellee is, admitting the facts as set forth in the bill of complaint to be true, they are not sufficient to entitle the appellant to the relief prayed, or to any relief, for the reason that under the law as then in force in the Territory of Oklahoma a contract for the sale of lands could not be binding or operative unless reduced to writing.

The court below adopted the view of appellees and justified its refusal to decree specific performance upon the theory that appellant, having received the wheat and oats, sold, and having in his possession the value of the produce resulting from his husbandry during his occupancy of the land in question, was in a position to fully compensate himself for any breach of contract on the part of the appellee, Dobrinski. Thereby entirely disregarding the fact that appellant would be responsible to the appellees for the value of the wheat and oats and the produce from the land, during his occupancy in the event of a decision adverse to him (Record, 44).

The court thought, too, the contract was inequitable, if not unconsionable, because only a small cash payment, $50.20, was paid on the purchase price, and the final payment of the total amount was not to have been paid until ten years had elapsed. Also because the appellant had agreed to apply the net annual profits toward the reduction of the mortgage debt, the contract involved the element of personal skill, and consequently the court could not in the exercise of its discretion lend its aid to enforce it. It was lacking in mutuality because appellant "is not bound to cultivate the farm, nor refrain from

turning it over to any irresponsible or incapable person he chooses" (Record, 44).

The bill of complaint is believed to have been sufficient to have entitled appellant to the relief prayed. Appellee was rather late in objecting to it, and for that reason alone his objection should have been overruled (Record, 34 and 36). However, it is urged that, measured by the established practice in such cases, the bill of complaint was all that could be required under the circumstances. It set up an executed contract on the part of the appellant, clear, certain and specific in its terms, with nothing left to conjecture, and the part performance, entering into possession under the contract, which was open and notorious, and with the knowledge and consent of the appellee, and the making of permanent and valuable improvements, all of which were alleged and relied upon (Record, 17-20), were sufficient to overcome the objection that the contract was void under the Statute of Frauds as well as the other objections that were raised by the court and counsel for appellees.

The authorities referred to by the court (Record, 43, 45) were calculated to and probably did give the court a misleading and erroneous impression as to the law governing such cases. A careful analysis will show that this is true. In Fish *vs.* Leser, 69 Ill., 304, a real estate agent acting in the interest of a purchase procured by fraudulent means the execution of a power to sell property in Chicago valued at $30,000 for only $21,000. The court declined to enforce the sale on the ground that it did not appear that the contract had been entered into with perfect fairness, and without misapprehension, misrepresentation or oppression, or was just or equitable. This case certainly bears no resemblance to the case at bar.

In King *vs.* Hamilton, 4 Peters, 310, where it was shown that there was a surplus of eight hundred and seventy-six acres in a patent conveying one thousand five hundred thirty-three and one-third acres, the court refused to enforce the contract so as to include the whole, the grantee having failed to perform or tendered performance of his contract, on the ground that the contract was still executory, and to require specific performance

would be manifestly unjust and inequitable.

Nothing appears in this case that is in conflict with contention of appellant.

In Hennessey *vs.* Woolworth, 128 U. S., 438, it appeared that husband and wife had authorized the sale of certain property belonging to the wife for a net sum. The agent sold the property under an agreement for the gross sum which had been named as the net sum and upon installment payments extending over a period of years. An attempt was made to show that the husband had assented to the agreement of sale. Court refused specific performance on the ground that it did not appear that the wife had authorized, directed, or ratified the agreement of sale under the terms named.

In Buck *vs.* Tucker, 42 Cal., 347, defendants in ejectment claimed title to property in question under an agreement in writing in which there was mere mention of "value received" and "a valuable consideration." Court refused relief, saying that it could not surmise defendants' case to be "better than they themselves have alleged it to be," and the court could not assume the consideration to have been adequate.

In Chapman *vs.* Morgan, 55 Mich., 124, an option to purchase land for a stated price was given in consideration of $10.00, good until a date named, etc. Purchase under option was not made within time nor was there a tender of amount due and owner of property sold to another purchaser. Held that there were no equities that would enable holder of option to enforce specific performance.

Buck *vs.* Smith, 29 Mich., 166, relates to a contract of partnership involving element of personal skill and is not in point with case at bar. The other cases cited to support the contention that the alleged contract in the case at bar lacks mutuality are also decisions in cases involving the element of personal skill and have no application to this case.

In Williams *vs.* Morris, 95 U. S., 444, where one entered into possession of property under a lease, agreeing to pay a stipulated rent and subsequently claimed to hold under a parol contract of purchase, the court declined to enforce specific performance, primarily, for the reason

that "tenants are never allowed to deny the title of their landlord, nor set up a title against him, acquired during the tenancy, which is hostile in its character," and also for the reason that the evidence failed to show part performance of the alleged contract sufficient to take the case out of the operation of the statute.

This is one of the cases which is relied upon by the appellant, and the principles enunciated in it are believed to be entirely in accord with his contention.

In Baldwin *vs.* Squier, 31 Kan., 283, where the owner of a tract of land made a parol contract with B. to live with and take care of him till his death and he would give her his land. Specific performance refused, as value of services for less than one and one-half years could be easily estimated, and there was no such part performance as would take case out of scope of Statute of Frauds. Court declined to consider improvements made after death of A., as title did not pass to B. at A.'s death. Held, too, that living with owner was not notorious and exclusive possession required.

Brown *vs.* Hoag, 35 Minn., 373, supports the contention of appellant and is believed to be much in point.

From the pleadings in this cause as shown by the record and the proceedings that were had, appellant would appear to be entitled to the relief prayed. He certainly was entitled to have his case heard.

Except that the contract was in parol there was nothing unusual about it. Appellant had agreed to pay the price asked and, it may be assumed, accepted the terms offered. He made a small payment in cash. This, however, is not deemed material. Cheney *vs.* Libbey, 134 U. S., 68.

He agreed to pay the whole amount of the purchase price in ten years. The fact that in addition he agreed to pay over to the mortgagee the annual net proceeds of the farm, with a view of reducing his interest-bearing debt, has, in the judgment of counsel, no effect upon his rights. Nor would his failure to perform his agreement in this regard make the alleged contract inequitable or unconsionable. In the absence of some express restriction to which he had assented he was privileged to make

any use of the land he saw fit subject only to the payment of the mortgage debt when due.

The conduct of both the appellant and appellee, Dobrinski, is consistent with no other theory than that alleged by appellant that he entered into possession under a parol contract to purchase and with the full knowledge and consent of appellee, Dobrinski, made permanent and valuable improvements, such as any purchaser of farm property who expected to reside permanently upon it would naturally make, and began to cultivate the soil, and offers and still offers to carry out his contract to the letter. If there was no contract, no agreement between the parties, why was appellant permitted to appropriate without objection the wheat and oats, which it is admitted was the property of the appellee, Dobrinski (Record, 33), and why was he permitted to remain in the peaceable and undisputed possession of the land purchased for more than eight months? Why was not some effort made to show that he was a trespasser, if he was? Equity and fair dealing would seem to dictate that the appellee, Dobrinski, after he has accepted whatever benefits there may have been, under the contract when entered into, as viewed from his stand-point, and after permitting the appellant to enter into possession, under the contract, and devote his time, his skill and his substance to the improvement and development of what he probably regarded as his permanent home, should not now, when because of changed conditions, or for any reason which he must be deemed to have anticipated, receive all the benefits of his contract and escape its burdens. During all the time of the appellant's occupancy of the premises, which he claims to have purchased, the courts were open to appellee, Dobrinski, and he should, in all fairness have asserted his rights there. Having failed to act until after the suit to specifically enforce the contract was filed his mouth should be closed by estoppel.

The objection that the contract sought to be enforced is inequitable and unconsionable resolves itself into the one proposition that appellant did not agree to pay off the total amount of the indebtedness until ten years had elapsed. Practically the same objection was raised in

Morrison *vs.* Peay, 21 Ark., 110, in which the Court said:

> "The parties were fully competent to contract with each other—the contract was fairly made without fraud or mistake, was upon good consideration, its terms clearly proven, and is unattended with any circumstances which would make its enforcement inequitable. The only objection urged is that the lands were not leased on terms sufficiently advantageous to the bank. This was for the judgment of the Trustee, who it must be supposed had capacity to transact business. No doubt they thought at the time the contract was made that it was for the best—but if experience has shown that the bank has realized less than it might have realized it is surely no reason why the contract should not be faithfully performed by both parties. The objection viewed in the most favorable light amounts to a mere naked hardness of bargain, and to sanction which would be to make a bad bargain a good excuse for bad faith. No court has ever gone so far as that, especially when as in the case before us it would enable the party urging the objection to practice a fraud on the party seeking to enforce the contract."

And in Kerr *vs.* Moore, 92 Pac., 107:

> "Assuming that the element of mutuality was lacking at the time the contract was entered into it was supplied upon the offer of performance being made by plaintiff since thereby the remedy to enforce it clearly became mutual." Thurber *vs.* Meves, 119 Cal., 35; 50 Pac., 1063; 51 Pac., 536; Woodruff, 44 N. J. Eq., 349; 16 Atl., 4; 1 L. R. A., 380; Richards *vs.* Green, 23 N. J. Eq., 536.

So too in S. & N. Ala. R. R. Co., *vs.* Highland Ave. & Belt R. R. Co., 98 Alabama 405.

In Watermann on Specific Performance, Section 179 is this language: Although inadequancy of consideration in contracts of sale either in the price or property sold may be a ground of defense yet the facility of contracting and the free exercise of the judgment and will of the parties require that as a general rule they should be the sole judges of the value of the benefits to be derived from their bargains. It is therefore manifestly just and expedient that mere inadequacy of consideration or value should not in itself be deemed by the court a sufficient reason to refuse to specifically enforce a contract or cause to set it aside. And such is now the rule. For courts of equity as well as courts of law act upon the ground that every person who is not from peculiar condition and circumstances under disability is entitled to dispose of his property in such manner and upon such terms as he chooses; and whether his bargains are wise and discreet or profitable or unprofitable or otherwise are considerations not for courts of justice but for the party himself to deliberate upon. The reason of this is to be sought in the extreme difficulty of judging as to the feeling and motives which may have actuated the parties and the corresponding variety of opinions which may be formed with reference to the sufficiency of the consideration. To this the author cites many authorities. And to the same effect are the following authorities which show it is the modern, and we may add the more reasonable rule—3 Pom. Eq., Section 1405 and notes; Fry on Spec. Performance, Section 275, *et seq.*; Osgood *vs.* Franklin, 2 Johns, Ch. 1; Ochs *vs.* Kramer, 107 S. W., 260.

In Willard *vs.* Taylor, 75 U. S., 557, Mr. Justice Field said:

> "The question in such cases always is, was the contract, at the time it was made, a reasonable and fair one? If such were the fact, the parties are considered as having taken upon themselves the

> risk of subsequent fluctuations in the value of the property, and such fluctuations are not allowed to prevent its specific enforcement."

Where there is a completed contract, founded on an executed consideration, the doctrine of mutuality, it would seem, might well be ignored. So also where the consideration for the contract sought to be enforced is the contemporaneous contract or obligation of the party seeking enforcement, there can be, as a rule, no lack of mutuality of obligation. 26 Enc. of L., 2d Ed., 31, citing South, etc., Alabama R. Co. *vs.* Highland Ave., etc., R. Co., 98 Ala., 400; 39 Am. St. Rep., 74.

Had the contract in this case actually been reduced to writing the appellee, Dobrinski, would probably never have refused performance. Being in parol it is discretionary with the Court whether the contract shall be enforced or not, but this discretion must be exercised according to well established rules. The element of personal skill is not involved in the contract under consideration and consequently is not affected by decisions in such cases.

In Morrison *vs.* Peay, 21 Ark., 110, the Court said:

> "As to the argument that this is a case where the Court ought not to interfere it may be remarked that the specific performance of contracts is said to be a matter of discretion in the court. This must not be understood, however, to mean an arbitrary capricious discretion dependent upon the mere pleasure of the judge, but a sound and reasonable discretion governed as far as it may be by general rules and principles, but which at the same time withholds or grants relief according to the circumstances of each particular case when these rules and principles will not furnish an exact measure of justice. 2 Story Eq., Sec. 742. In view of this principle and upon an examination of some of the adjudications in which it has been applied (King et al. *vs.* Hamilton, 4 Peters, 311; Mechanics Bank of Alexandria *vs.* Lynn, 1 Ib., 376; Phillips *vs.* Thompson, 1 John, Ch. Rep.,

132; 5 Gilman, 223), we have reached the conclusion that there is nothing in this case which would warrant a denial of the remedial power of the Court."

And in Stevens *vs.* Trafton, 93 Pac., 811:

"Appellant contends that the court erred in granting the so-called motion for a nonsuit for the reason that the testimony tended to prove all the material allegations of the complaint. The respondent, on the other hand, argues that specific performance of a contract is never demandable as a matter of right, but relief should be granted or withheld in the discretion of the trial court, and in this case the court below having withheld relief to plaintiff on his own showing, and the evidence furnishing no ground for different inferences, the finding of the lower court thereon should not be disturbed. It is well settled that whether or not the contract will be specifically enforced is a matter of judicial discretion. Dewey *vs.* Spring Valley Land Co., 98 Wis., 83; 73 N. W., 565. And assuming that the respondent was correct in his conclusion, we think he is wrong in his premises. As we read the testimony it furnishes no reasonable ground for different conclusions and therefore no ground for the exercise of discretion. Plaintiff testified that the purchase price of the lot was $100, all of which had been paid. Had no written receipts been received in evidence plaintiff's case would have embodied no uncertainty whatever. The parties, the subject-matter, and the terms or circumstance surrounding the making of the contract were all clearly and definitely stated. According to the evidence given by the plaintiff the terms of the agreement were not merely partly but fully performed on his part, and in addition to that the defendant had put the plaintiff into actual possession of the premises upon which he had erected substantial improvements. Under these circumstances the court had

> the power to decree specific performance of the contract."

And in Willard *vs.* Taylor, 75 U. S., 557:

> "The discretion which may be exercised in this class of cases is not an arbitrary or capricious one, depending upon the mere pleasure of the court, but one which is controlled by the established doctrines and settled principles of equity."

The appellant having partly performed his contract and offering or tendering performance according to its terms and having entered into possession and made improvements in reliance upon the contract, is clearly entitled to a decree for specific peformance and should not be required to hazard his rights on the possible outcome of a suit at law.

In 26 Enc. of L., 2d Ed., 104, this general rule is announced:

> "By its very nature, real estate has no measurable money equivalent. One who has a contract which entitles him to conveyance of land cannot be compelled to accept money compensation instead, for money may not be a fit equivalent. As to him equity will always presume that the land possesses a special value that is not, for the purposes of the suit convertible into any precise sum. Hence, it follows that a contract relating to land will be enforced as a matter of course, if it is fair and definite in its terms and stands upon a superior consideration."

Morrison *vs.* Peay, 21 Ark. Rep., 110:

> "What is to be deemed a part performance in the sense of a court of equity is now well settled. In Lester *vs.* Foxcroft (1 White & Tudor's Leading Cases in Equity, Marg. p. 507), decided at a very early day in England, specific performance of a parol agreement for the lease of lands

was decreed notwithstanding the Statute of Frauds after acts of part performance on the part of the lessee by pulling down an old house and building new ones according to the terms of the agreement. * * *

The doctrine upon which these cases stand has been adhered to by the courts, both in England and in this country, with remarkable uniformity. Mr. Justice Story, in his work on Equity Jurisdiction, Vol. 2, Sec. 761-2, lays it down as a general rule, 'that nothing is to be considered as a part performance which does not put the party into a situation which is a fraud upon him unless the agreement is fully performed. Thus for instance, if upon a parol agreement a man is admitted into possession, he is made a trespasser if there be no agreement valid in law or equity. Now, for the purpose of defending himself against a charge as a trespasser and a suit to account for the profits in such a case, the evidence of a parol agreement would seem to be admissible for his transaction, and if admissible for such a purpose, there seems no reason why it should not be admissible throughout. A case still more cogent might be put where the vendee upon a parol agreement for a sale of land should proceed to build a house on the land in the confidence of the due completion of the contract. In such a case there would be a manifest fraud upon the party in permitting the vendee to escape from a due and strict fulfillment of such agreement.' "

Brown *vs.* Hoag, 35 Minnesota Rep., 373:

"While the phrase 'part-performance' is commonly used as a short and convenient statement of the general ground upon which verbal agreements regarding real estate are enforced, the whole doctrine rests upon the principle of frauds and proceeds upon the idea that the party has so changed his situation on the faith of the oral agreement that it would be a fraud upon him to

permit the other party to defeat the agreement by setting up the statute. Hence, the term 'part-performance' falls far short of expressing the whole doctrine and theory of courts of equity in this matter.

The change of situation necessary to create this equitable estoppel must of course have been made in reliance upon and in pursuance of the oral agreement and so connected with the performance of the contract that from the nature of the case the defendant should understand it was done in reliance upon his agreement. The acts done must be related to and connected with the contract and the defendant's performance of it. The plaintiff must show that in reliance on the contract he has proceeded either in performance or pursuance of it to so far alter his position as to incur an unjust and unconscientious injury and loss, in case the defendant is permitted to rely upon the statutory defence. But this change of situation is not confined to doing what the contract stipulated—that is, 'part-performance' strictly so called. Browne, St. Frauds, Sections 457, 458.

As already remarked, the doctrine of part-performance rests on the ground of fraud. The underlying principle is that where one of the contracting parties has been induced or allowed to alter his situation on the faith of an oral agreement within the statute to such an extent that it would be a fraud on the part of the other party to set up its invalidity, equity will make the case an exception to the statute. After a party has been induced to make expenditures or a change of situation in regard to the subject matter of the agreement upon the supposition that it was to be carried into execution, and the assumption of rights thereby to be acquired, so that the refusal to complete the execution of the agreement is not merely a denial of rights which it was intended to confer, but the infliction of an unjust and unconscientious injury and loss, in such a

case the party is held by force of his acts or silent acquiescence which have misled the other to his harm to be estopped from setting up the statute. Glass *vs.* Hulbert, 102 Mass, 24; Browne, St. Frauds, Section 457-a."

Riggles *vs.* Erney, 154 U. S. Rep., 244:

"Indeed the rule is too well settled to require further citation of authorities that if the parol agreement be clearly and satisfactorily proven and the plaintiff relying upon such agreement and the promise of the defendant to perform his part has done acts in part performance of such agreements to the knowledge of the defendant—acts which have so altered the relations of the parties as to prevent their restoration to their former condition—it would be a virtual fraud to allow the defendant to interpose the statute as a defence and thus to secure to himself the benefit of what has been done in part performance. It must appear, however, that the acts done by the plaintiff were done in pursuance of the contract and for the purpose of carrying it into execution and with the consent or knowledge of the other party. While acts done prior to the contract or preparatory thereto, such as delivering abstracts of titles, measuring the lands, drawing up deeds, etc. are not regarded as sufficient part performance. It is otherwise with such acts as taking open possession of the land sold or making permanent or valuable improvements thereon or doing other acts in relation to the lands manifestly inconsistent with any other theory than that of carrying out the oral undertaking."

Townsend *vs.* Vanderwerker, 160 U. S. Rep., 103:

"The general principle to be extracted from the authorities is that if the plaintiff, with the knowledge and consent of the promisor, does acts pursuant to and in obvious reliance upon a

verbal agreement which so changes the relations of the parties as to render a restoration of their former condition impracticable, it is a virtual fraud upon the part of the promisor to set up the statute in defence, and thus to receive to himself the benefit of the acts done by the plaintiff, while the latter is left to the chance of a suit at law for the reimbursement of the outlays, or an action upon a quantum meruit for the value of his services. In discussing what are and what are not acts done in part performance which will entitle the plaintiff to a decree in his favor, the entry into possession of the land and the making of valuable improvements thereon is charged by all the cases as one of the most satisfactory evidences of part performance and entitling plaintiff to a decree in his favor. 3 Pomeroy Eq. Juris., Section 1409; Fry on Spec. Perf., Section 585; Willis *vs.* Stradling, 3 Ves. Jr., 378; Mundy *vs.* Jolliffee, 5 My. & Cr., 167; Williams *vs.* Evans, L. R., 19 Eq., 547."

Whitney *vs.* Hay, 181 U. S. Rep., 77:

"Referring to the Statute of Frauds and to the mischiefs intended to be reached by it, Mr. Justice Story says: 'It is obvious that courts of equity are bound, as much as courts of law, by the provisions of this statute, and therefore they are not at liberty to disregard them. That they do, however, interfere in some cases within the reach of the statute is equally certain. But they do so, not upon any notion of any right to dispense with it, but for the purpose of administering equities subservient to its true objects, or collateral to it, and independent to it.' A case of such interference is when a court of equity enforces the specific performance 'of a contract within the statute, where the parol agreement has been partly carried into execution. The distinct ground upon which courts of equity interfere in cases of this sort is, that otherwise one party would be able to

practice a fraud upon the other; and it could never be the intention of the statute to enable any party to commit such a fraud with impunity. Indeed, fraud in all cases constitutes an answer to the most solemn acts and conveyances, and the objects of the statute are promoted, instead of being obstructed by such a jurisdiction for discovery and relief. And where one party has executed his part of the agreement, in the confidence that the other party would do the same, it is obvious, if the latter should refuse, it would be a fraud upon the former to suffer this refusal to work to his prejudice.' 1 Story's Eq. Juris., Sections 754, 759.

This rule finds illustrations in cases in this court; in Neale *vs.* Neale, 9 Wall. 1, 9, where it was said that the statute of frauds requires a contract concerning real estate to be in writing, but courts of equity whether wisely or not, it is too late now to inquire, have stepped in and relaxed the rigidity of this rule, and hold that a part performance removes the bar of the statute, on the ground that is is a fraud for the vendor to insist on the absence of a written instrument, when he had permitted the contract to be partly executed; in Brown *vs.* Sutton, 129 U. S. 238-9, which was a suit to enforce the specific performance of an oral engagement to convey certain real estate to the promisee, in consideration of her taking care of the promisor during the remainder of his life, as she had done in the past, the court holding that there had been such part-performance in its execution as to bring the case within the exception made by that doctrine in the requirement of the Statute of Frauds that the sale of the lands must be in writing; and in Townsend *vs.* Vanderwerker, 160 U. S. 171, 184, where it was said that the general principle to be extracted from the authorities is that if the plaintiff, with the knowledge and consent of the promisor, does acts pursuant to and in obvious reliance upon a verbal agreement, which so changed the rela-

tions of the parties as to render a restoration of their former condition impracticable, it is a virtual fraud upon the part of the promisor to set up the statute in defence, and thus to receive to himself the benefit of the acts done by the plaintiff, while the latter is left to the chance of a suit at law for the reimbursement of his outlays, or to an action upon a quantum meruit for the value of his services. Courts of equity, said Lord Cottenham, exercise their jurisdiction in decreeing specific performance of verbal agreements, where there has been part performance, for the purpose of preventing the great injustice which would arise from permitting a party to escape from the engagements he has entered into, upon the ground of the Statute of Frauds, after the other party to the contract has, upon the faith of such engagement, expended his money or otherwise acted in execution of the agreement. Under such circumstances, the court will struggle to prevent such injustice from being effected; and, with that object, it has, at the hearing, when the plaintiff has failed to establish the precise terms of the agreement endeavored to collect, if it can, what the terms of it really were. It is not necessary, in this case, to adopt any such course of proceeding; for I think an agreement for a lease sufficiently proved, and that acts of part performance are proved, so as to take the case out of the Statute of Frauds; and I think the defences set up have wholly failed. Mundy *vs.* Jolliffee, 5 My. & Cr. 167, 177.

To the like effect are numerous other American and English cases which are familiar to the profession and need not be cited. They all proceed upon ground that, although in a suit to enforce the specific performance of a parol agreement in reference to land the defendant cannot be directly charged upon the alleged contract itself, he may be held—the evidence clearly showing part performance, in substantial particulars, of such agreement—to do what justice requires to be

done under the equities arising from acts done after the making of the agreement and in execution of its provisions. To refuse under some circumstances to compel the full execution of an agreement of that kind which has been partly performed would make the statute an instrument of fraud and that a court of equity will not permit. It is not arbitrary or unreasonable, said the Lord Chancellor in Maddison *vs.* Alderson, L. R. 8, App. Cas. 467, 476, to hold that when the statute says that no action is to be brought to charge any person upon a contract concerning land, it has in view the simple case in which he is charged upon the contract only, and not that in which there are equities resulting from res gestae subsequent to and arising out of the contract."

The question of the enforcement of a parol contract for the sale of lands has been passed upon by the courts of Oklahoma. In Sutterland *vs.* Taintor, 17 Okl., 427, Hainer, J., said:

"It is contended by plaintiff in error that the parol contract which made the basis of this action was void and non-enforceable under the statutes of Oklahoma and this is the only question relied upon for a reversal of the cause. This contention cannot be sustained.

The plaintiff in the court below did not rely solely upon the contract but based his contention upon the ground that the contract was fully executed by the plaintiff in this that the consideration was paid and that the plaintiff was put in possession of the premises and immediately commenced to improve the land and make permanent improvements thereon and hence that the contract was enforceable although it was merely a parol agreement and no note or memorandum was made between the parties at the time said contract was entered upon. And this was the finding of the trial court after hearing the evidence that was adduced upon the trial.

In Halsell *vs.* Renfrow, 14 Okla. 674, this court had this question under consideration but it was there held that:

'A parol agreement for the sale of real estate may be specifically enforceable where there has been such part performance of the contract as would make it impracticable to place the parties in their original positions and thus make it a fraud upon one of the parties not to enforce the agreement.'

And that:

'The payment of the purchase money is not alone such part performance of an agreement to sell real estate as will authorize a court to enforce its specific performance. But part payment and taking possession in good faith or taking possession with the knowledge of the vendor and making valuable improvements constitutes such part performance as will ordinarily warrant a court in decreeing specific performance of the contract.' "

We think this case is decisive of this question and that the court was fully warranted under the evidence in decreeing specific performance.

Upon the record, considering the authorities above referred to, it was error for the court to have dismissed the bill of complaint "for the reason that the plaintiff's petition did not state facts sufficient to constitute a cause of action," and the court is respectfully requested to reverse the judgment of the lower court because of the many errors committed and direct any further proceedings that may be necessary.

Respectfully submitted,

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Of Counsel.

JAN 23 19[illegible]
JAMES H. McKENNEY,

No 5122

IN THE SUPREME COURT

OF THE UNITED STATES

John F. Haffner,
Appellant,
v.
Michael Dobrenski and
Henry Shultz,
Appellees.

No. [illegible] 35.

Brief in Support of Motion to Dismiss.

C. C. FLANSBURG,
Attorney for Appellees for the
Purpose of the Motion.

IN THE SUPREME COURT

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John F. Haffner,
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Brief in Support of Motion to Dismiss.

STATEMENT OF THE CASE.

During the year 1901, Michael Dobrenski was the owner of 160 acres of land in Kingfisher County, Oklahoma Territory. About this same time he deeded this land to appellee Henry Shultz in trust, but said Shultz has quit claimed since this litigation was begun and at this time has no interest in the land.

During 1901, the appellant, John F. Haffner brought this action of specific performance against the appellees herein, alleging an oral contract for the purchase of said 160 acres of land from appellee, Michael Dobrenski. He does not claim that he actually paid any money nor that there was any writing to evidence any contract. He claims, however, that he had the right under said oral contract to pay for said land only as he could raise the money from the sale of the products off from said land

from year to year. Said Haffner at that time drove the tenant of Dobrenski off from the land and forcibly possessed himself of the same, and ever since has been in possession of said land farming the same without the payment of one cent of money. The contention of Dobrenski is that he never made any contract, either verbal or written, to sell this land to appellant Haffner.

Dobrenski brought forcible entry and detainer against Haffner and obtained judgment for possession of said land against Haffner, but Haffner then obtained an injunction against Dobrenski in this specific performance suit, restraining him from enforcing his forcible entry and detainer judgment.

The district court of Kingfisher county, Oklahoma Territory, found in favor of Michael Dobrenski and against said John F. Haffner in this suit and the supreme court of Oklahoma Territory on Sept. 6, 1906, affirmed this decree.

On Oct. 29, 1907, appellant filed a petition in the supreme court of Oklahoma territory, praying for an order allowing an appeal to this court and also praying that all proceedings in the Oklahoma courts be superseded and stayed until the determination of this appeal in this court.

On Oct. 29, 1907, the supreme court of Oklahoma Territory allowed the appeal and fixed the supersedeas bond at $2500, and ordered that if this appeal is filed in this court within thirty days and said bond given, that all proceedings, under the mandate of the supreme court of Oklahoma Territory, be stayed pending final disposition of this appeal in this court.

No bond of any kind has been filed by appellant, neither was this appeal filed in this court within the thirty days required in the order allowing this appeal by the supreme court of Oklahoma Territory. That order was

signed on the 28th day of October, 1907, and this appeal was filed in this court on the 7th day of December, 1907.

We contend that this appeal must be dismissed for two reasons:

1. Because no appeal bond of any kind has been filed.

2. Because the amount in controversy does not amount to $5000.

We discuss below these two propositions briefly. We call attention to the motion and showing filed herewith that no bond has been filed as required, and that the value of this property is not $5000, but not to exceed $4000.

1. Because No Appeal Bond Filed.

Sec. 1000, page 612, Vol. 4, U. S. Federal Statutes Annotated is as follows:

"Every justice or judge signing a citation on any writ of error, shall, except in cases brought up by the United States or by direction of any Department of the Government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs, where the writ is a supersedeas and stays execution, or all costs only where it is not a supersedeas as aforesaid."

An appeal is not perfected without a bond or undertaking.

Beardsley v. Arkansas, 158 U. S. 126.

Failure to execute bond may be ground for dismissing appeal.

Beardsley v. Arkansas, 158 U. S. 126,
Kuysburg v. Buckner, 134 U. S. 650,
Branen v. McConnell, 124 U. S. 489.

2. Because Amount in Controversy does not Amount to $5000.

Sec. 9, page 283, Vol. 7, Fed Statutes Annotated, respecting appeals from the Supreme Court of Oklahoma Territory to U. S. Supreme Court, is as follows:

"Writs of error and appeals from the final decisions of said supreme court (Oklahoma Supreme Court) shall be allowed and may be taken to the Supreme Court of the United States in the same manner and under the same regulations as from the Circuit courts of the United States, where the value of the property or the amount in controversy, to be ascertained by oath or affirmation of either party or other competent witness, shall exceed $5,000."

See also:
Shute v.Reyser, 149 U. S. 650,
Azetec Mining Co. v. Ripley, 151 U. S. 79

The fact that Oklahoma Territory has since become a state in no way affects the old proceedure. See Sec. 15, page 331, Federal Statutes, Annotated Supplement 1907.

Under these authorities and showing made this appeal certainly must be dismissed.

Respectfully submitted,
C. C. FLANSBURG,
Attorney for Appellees for the
Purpose of the Motion.